IN THE

Supreme Court of the United States

October Term 1979

No. . . . **79-1502**

KERN COUNTY WATER AGENCY, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, SANTA CLARA VALLEY WATER DISTRICT AND TULARE LAKE BASIN WATER STORAGE DISTRICT,

Petitioners,

vs.

SIERRA CLUB, *et al.*,

Respondents.

Petition for Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit.

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Petitioners,

vs.

SIERRA CLUB, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding. Petitioners are California public agencies that have contracted with the State of California for continuing delivery of water from the State Water Project. The State water diversions needed for those deliveries are the subject of this action.

Opinions Below.

The decision of the U.S. Court of Appeals is officially reported at 610 F.2d 581 and is reproduced in the Appendix.

(App. pp. 5-62.) The decision of the District Court is officially reported at 400 F.Supp. 610 (N.D. Cal. 1975) and is also reproduced in the Appendix. (App. pp. 63-129.)

Jurisdiction.

The Decision of the Court of Appeals was entered on October 31, 1979. The plaintiffs filed a petition for rehearing on November 21, 1979, which was denied on January 17, 1980. A petition for writ of certiorari is due by April 16, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Rule 19.1(b) of this Court.

Questions Presented.

1. Does the Rivers and Harbors Act of 1899 create a private right of action that authorizes plaintiffs to commence and prosecute this action?

2. Does Section 10 of the Rivers and Harbors Act of 1899 (hereinafter the "1899 Act" or "the Act") require a California state agency to obtain a federal *operating* permit from the United States Army Corps of Engineers, in order to divert water for reasonable, beneficial public uses, even if that diversion (1) represents the exercise of water rights established and regulated under state law, (2) is made through pumping facilities that are not located in navigable waters, (3) is made from an artificially created body of water, (4) is made through an intake structure which has been approved and permitted under the 1899 Act, and (5) does not interfere with navigation?

3. If so, do the Section 10 permits that the Corps of Engineers issued to the California Department of Water Resources for the intake structure for Clifton Court Forebay prior to the filing of this action, satisfy that requirement?

Statutory Provisions Involved.

This case involves an interpretation of Sections 10, 12 and 17, of the Rivers and Harbors Act of 1899, 30 Stat. 1151 (1899), 33 U.S.C. §§ 403, 406 and 413. Those sections are set forth in the Appendix to this petition. (App. pp. 1-4.) This case also involves an interpretation of 38 federal statutes that recognize State authority to regulate, under state law, water supply diversions. The relevant sections of those statutes are also set forth in the Appendix to this petition. (App. pp. 131-151.)

Statement of the Case.

1. Nature of the Controversy.

This case poses two fundamental issues concerning the Rivers and Harbors Act of 1899. First, it raises the question of whether the language of the 1899 Act can fairly be interpreted as creating a private right of enforcement. Six circuits have considered this question and have reached nearly as many results. There is a direct conflict on this issue between the Ninth Circuit opinion in this case and rulings by the Third and Sixth Circuits. Second, it raises issues regarding the extent to which Congress intends to subordinate state water rights law to federal regulation. It represents an effort to subordinate state law in a situation in which that law is not inconsistent with congressional directives within the meaning of this Court's decisions in *California v. United States*, 438 U.S. 645, 98 S.Ct. 2985 (1978) and *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012 (1978).

2. Facts of the Case.

The State of California has constructed and is operating a multi-billion dollar water project pursuant to a bond authorization approved by the State's electorate in 1960 and

pursuant to decisions of the California Supreme Court. Intervenors and 27 other public water agencies have contracted with the State to repay the costs of constructing and operating that Project, in return for long-term deliveries of specific quantities of water from that project, which is commonly known as the State Water Project (SWP). Petitioners need that water to meet water supply requirements of thirteen million people and a significant proportion of California's agricultural economy. (App. pp. 8, 9, 66.)

Essentially all the water supplies for the SWP are currently diverted from the Sacramento-San Joaquin Delta (Delta) through a water diversion facility known as the Delta Pumping Plant. (A map of the Delta, showing the Delta Pumping Plant in the southern portion thereof, is attached to the District Court opinion, p. 130A of the Appendix.) That facility is located outside navigable waters and diverts water from an artificial body of water known as Clifton Court Forebay. It in turn is connected to the Delta by means of an intake structure that was installed in a levee of a Delta Channel under a permit issued by the Corps of Engineers pursuant to Section 10 of the Rivers and Harbors Act of 1899. The evidence in this case does not show that the SWP diversion of waters from the Delta Pumping Plant impedes navigation. The California Department of Water Resources (DWR) operates the SWP. (App. pp. 70, 71.) The United States has built a similar multi-billion dollar water project, known as the Central Valley Project (CVP) which also exports water from the Delta. (App. pp. 9, 69, 70.)

DWR and the United States divert water from the Delta for the SWP and the CVP pursuant to water rights permits issued by the California Water Resources Control Board (WRCB). That Board has reserved continuing jurisdiction over those permits to regulate SWP and CVP water diversion operations, to protect prior vested water rights, water quality

in the Delta, and fish and wildlife resources. Accordingly, the WRCB limits SWP and CVP operations to maintain specific salinity and streamflow conditions in the Delta channels at specific times.[1]

The WRCB regulates SWP and CVP diversions of water from the Delta under an extensive body of State water law. The State has developed that law through comprehensive statutory controls, California Constitution, Article X, Section 2; Cal. Water Code Part 2, Division 2, and implementing judicial rulings, *Environmental Defense Fund v. East Bay Municipal Utility District*, 26 Cal.3d 183, 194 ff (1980), in order to assure that California's water resources are used in an economically efficient and environmentally sound manner. (Public Resources Code §21000, *et seq.*)

The State of California is planning to modify its present Delta diversion operations by building a canal, known as the Peripheral Canal. However that facility is not the subject of this petition. (App. pp. 71, 72.)

3. Proceedings Below.

Plaintiffs filed this action in March 1971, to enjoin DWR and the United States from diverting water from the State Water Project's Delta Pumping Plant and Central Valley Project's Tracy Pumping Plant until the Corps of Engineers issues operating permits for those diversions. In addition, the action seeks to enjoin construction of the Peripheral Canal until the Corps has approved its construction and operation, and until the constructing agency complies with

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[1]The WRCB revised the SWP and CVP Delta diversion water rights permits in August 1978, by issuing Water Rights Decision 1485. Plaintiff Sierra Club, participated in the lengthy administrative proceedings on which the WRCB based that decision. Although fourteen suits are now pending in the California Superior Court challenging that decision, the Sierra Club has not challenged it. (Judicial Council Coordination Proceeding No. 548; San Francisco County Superior Court.)

the relevant requirements of The National Environmental Policy Act, 42 U.S.C. §§4331 and 4332 and the California Environmental Quality Act, California Public Resources Code §21000, *et seq.*

The District Court ruled that a private cause of action exists to enforce Section 10 of the 1899 Act (App. pp. 72-80); and that the diversions of water from the Delta by the SWP and the CVP constitute a sufficient technical modification of navigable capacity to require operating approval by the Corps under Section 10 of the 1899 Act. (App. pp. 80-93.) The Court also ruled that the Section 10 permits which the Corps had previously issued to DWR and the United States did not cover either the SWP or the CVP diversion operations. (App. pp. 93-99.)

The Court of Appeals rendered its opinion on October 31, 1979. It affirmed the existence of a private right of action under Section 10 of the 1899 Act (App. pp. 11-12), but dismissed one of the plaintiffs, Friends of the Earth, for lack of standing. (App. pp. 25-26.) It also affirmed that DWR must obtain operating permits from the Corps under Section 10 of the 1899 Act, in order to continue to divert Delta water through SWP's Delta Pumping Plant, unless otherwise exempted by Corps regulations. (App. pp. 26-39, 53-54.) In addition, it infers that the Corps can control the environmental impact of those diversions even if they do not affect navigation in any substantial way. (App. pp. 54-55, fn. 39.)

However, the Court of Appeals reversed the District Court with respect to operation of the federal CVP Tracy Pumping Plant. (App. pp. 40-49.) It ruled that Congress had impliedly approved that operation and had thus exempted it from any requirement to obtain operating permits from the Corps under the 1899 Act. Plaintiffs filed a petition for rehearing on the grounds that the Court had misapprehended the law

relating to implied Congressional authorization. The Court denied that petition without opinion, but stayed implementation of its decision pending this Court's action on the State's application for a writ of *certiorari*.

The State of California filed its petition for writ of *certiorari* with this Court on February 13, 1980. (Docket No. 79-1252.) Fifteen western states have filed an amicus curiae brief in support of the State's petition. The State's petition, like this petition, challenges the Court of Appeals' interpretation of Section 10 of the 1899 Act. However, it does not raise the private right of action question which is the focus of the first part of this petition. In addition, it does not raise the issues of statutory construction or adequacy of existing DWR permits, presented in the latter part of this petition.

4. Special Importance of the Issues.

The State's contracts with petitioners for delivery of water from the SWP constitute an essential element of that project, as well as a basic long-term water supply for the millions of people that reside within petitioners' service areas. Those contracts provide the basic means for financing the multi-billion dollar SWP and meeting the State's related constitutional limitation on State indebtedness, California Constitution Article XVI, Section 1. They are premised on the application of State water law to SWP's water diversions from the Delta, that do not impair navigation. (App. p. 66.)

Imposition of federal controls on the State's water diversions is of even more concern to petitioners than to the State, because those controls will seriously jeopardize petitioners' respective water supplies and their respective financial responsibilities. By allowing the U.S. Corps of Engineers to subordinate state laws in matters that extend beyond federal navigation requirements, the Court of Ap-

peals' opinion injects major uncertainty into California's multi-billion dollar State Water Project, and, more specifically, into petitioners' respective water supplies. (App. pp. 118-119.)

The Court of Appeals' opinion would, transfer the basic authority over the Project's water delivery capability to a federal agency that has no responsibility for the State Water Project's operational or financial integrity. In addition, that agency can ignore the legal safeguards that petitioners have developed over the past twenty years in cooperation with the State's electorate, legislature, and judiciary to assure optimum use, reliable operation, responsible funding, and financial feasibility (*Joint Brief of Intervenors Upon Completion of the Trial on Entitlement to Relief.*)

REASONS FOR GRANTING THE WRIT.

I.

This Case Presents Important Federal Questions That Deserve the Attention of This Court.

This petition raises two fundamental issues concerning the Rivers and Harbors Act of 1899: (1) whether the statute creates a private right of enforcement, and (2) whether the substantive provisions of Section 10 of the Act (33 U.S.C. §403) apply to water supply diversions approved pursuant to state law even if they do not adversely affect navigable use or the navigable capacity needed to support that use.

The private right of action issue has never been presented to this Court. Yet, there are decisions from six circuits that encompass a wide range of opinions from complete denial of such a right to complete acceptance of such a right. The law in this area is in utter confusion and needs clarification by this Court.

In addition, the Ninth Circuit opinion in this case literally ignores two of this Court's most recent private right of action cases (*Cannon v. University of Chicago*, ... U.S. ...., 99 S.Ct. 1946 (1979) and *Touche Ross & Co v. Redington*, ... U.S. ...., 99 S.Ct. 2479 (1979)) and thereby adopts an erroneous test to ascertain whether private rights of action exist. Given the importance of the 1899 Act to management and control of the nation's major waterways, this question deserves the Court's attention.

The interpretation of Section 10's scope and purpose is equally important as it raises fundamental issues of federalism that have never been fully briefed and argued to this Court. Although this Court has considered cases involving water diversions (*e.g., United States v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690, 19 S.Ct. 770 (1899); *Sanitary District of Chicago v. United States*, 266 U.S. 405,

45 S.Ct. 176 (1925); and *State of Wisconsin v. State of Illinois*, 278 U.S. 367, 49 S.Ct. 163 (1929)), the Court of Appeals has ruled that the United States has jurisdiction to control such diversions even if they may have no effect on navigation.

This issue could have a major impact on development of the western states. Historically, in accordance with long-standing federal laws and policies, the states have controlled water use within their boundaries, including balancing the often competing demands of instream uses (environmental, recreational, or scenic) with uses for irrigation and municipal purposes. Suddenly, under the Court of Appeals' opinion, the United States, through its Corps of Engineers, has the ultimate authority to balance instream uses with other competing water needs, *even if no federal interest under the 1899 Act exists*. The Court of Appeals' decision thus substantially diminishes California's control over water projects representing investments in the billions of dollars and thus, prejudices petitioners' water supplies. Such a result should not be allowed to prevail and this Court should grant the requested writ to properly balance the state and federal interests.

II.

The Court of Appeals' Opinion Improperly Implies a Private Right of Action to Enforce Section 10 of the 1899 Act.

A. IN GRANTING PLAINTIFFS A PRIVATE RIGHT OF ACTION, THE COURT OF APPEALS IMPROPERLY REJECTED THE SUPREME COURT'S MOST RECENT PRONOUNCEMENTS ON THIS SUBJECT AS A RESULT OF MISINTERPRETING UNITED STATES V. WYANDOTTE TRANSPORTATION COMPANY.

During the years this case has been pending, this Court has developed a body of law which establishes the method

for determining whether a federal statute implies a "private right of action." *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080 (1975); *National Railroad Passengers Corp. v. National Association of Railroad Passengers (Amtrak)*, 414 U.S. 453, 94 S.Ct. 690 (1974); *SIPC v. Barbour*, 421 U.S. 412, 95 S.Ct. 1733 (1975); *Cannon v. University of Chicago*, ... U.S. ...., 99 S.Ct. 1946 (May 1979) and *Touche Ross & Co. v. Redington*, ... U.S. ...., 99 S.Ct. 2479 (June 1979).

The Ninth Circuit Court of Appeals ignored the two 1979 decisions and compounded this error by ruling that the decisions in *SIPC v. Barbour, supra,* and in the *Amtrak* case, *supra,* do not apply to the Rivers and Harbors Act of 1899. (App. p. 12.) The Court of Appeals apparently reached this result because it misinterpreted this Court's ruling in *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 88 S.Ct. 379 (1967), and extended that holding far beyond the applicable facts.

1. Rejection of Recent Decisions.

There are three enforcement provisions in the 1899 Act: Section 12 (33 U.S.C. §406), Section 16 (33 U.S.C. §411), and Section 17 (33 U.S.C. §413). Section 16 is not applicable because this case only involves alleged violations of Section 10 of the Act. (33 U.S.C. §403, App. pp. 1, 2.) Section 16 only applies to violations of Sections 13, 14 and 15 of the 1899 Act. Therefore, the key enforcement language is found in Sections 12 and 17. These sections, as codified in 33 U.S.C., are set forth in the Appendix, at pages 2-4. They specifically state that the Attorney General and the Department of Justice shall enforce the 1899 Act.

The Court of Appeals noted these enforcement provisions and stated:

> Normally, these express statutory provisions would imply that no other means of enforcement are intended, with only clear contrary evidence of a legislative intent to rebut this presumption. (App. p. 16.)

The Appeals Court correctly cited *SIPC v. Barbour* and the *Amtrak* case, for these cases clearly hold that a private right of action is not generally to be implied in the face of statutory language of the type contained in the 1899 Act. 414 U.S. at 457-458, 94 S.Ct. at 693; 421 U.S. at 418-420, 95 S.Ct. at 1737-1738.

In spite of the Court of Appeals' recognition of this precedent and of its generally controlling nature, it rejected the applicability of these cases to the 1899 Act, stating that *Wyandotte Transportation Co. v. United States, supra*, requires a different result. (App. p. 17.) In making this ruling, the Court misinterpreted the scope of the *Wyandotte* decision and ignored important language contained in *Cannon v. University of Chicago, supra*.

2. Misinterpretation of Wyandotte Transportation v. United States.

The *Wyandotte* case is simply not precedent for a private right of action issue. *The United States was the plaintiff in Wyandotte*, and the Court did not even address the issue of private parties' right to suit. In *Wyandotte*, the defendant contended that a sunken vessel could be abandoned, thereby relieving its owner of the duty of raising it and removing it as a navigational obstruction. Defendant further claimed that if the United States removed the vessel, the United States could only recover its costs by selling the vessel and its cargo, but could not obtain a personal judgment against its owner if the removal costs exceeded the salvage value. It was in this context, where the Government had spent several million dollars raising a dangerous barge load of

liquid chlorine from the bottom of the Mississippi River, that this Court said:

> But our reading of the Act does not lead us to the conclusion that Congress must have intended the statutory remedies and procedures to be exclusive of all others. There is no indication anywhere else — in the legislative history of the Act, in the predecessor statutes, or in nonstatutory law — that Congress might have intended that a party who negligently sinks a vessel should be shielded from personal responsibility. We, therefore, hold that the remedies and procedures specified by the Act for the enforcement of § 15 were not intended to be exclusive. Applying the principles of our decision in *Republic Steel,* we conclude that other remedies, including those here sought, are available to the Government. (389 U.S. at 200-201, 88 S.Ct. at 385.)

To use this language to override the usual rules for ascertaining the existence or nonexistence of a private right of action under the 1899 Act extends the *Wyandotte* case far beyond its holding. It ignores the fact that the objective of the case was to protect the United States' right to fully protect navigable waterways and the fact that the very language quoted ends with the phrase "other remedies . . . are available *to the Government.*" *Id.* It further ignores *Wyandotte's* later statement that "a principal beneficiary of the Act, if not the principal beneficiary, is the government itself." *Id.* It is one thing to hold that the principal beneficiary of the Act (the United States) should have broad remedies available to protect the public waterways of this nation. It is a far different thing to use such a holding to discard the normal rules of statutory interpretation as they apply to the 1899 Act. Yet it was just such a conclusion which led the

Court of Appeals to reject this Court's rulings in *Amtrak* and *SIPC v. Barbour*.

In reaching its conclusion that the usual statutory interpretation tests do not apply to the 1899 Act, the Court of Appeals also overlooked the references to the 1899 Act and *Wyandotte* in the very recent decision of *Cannon v. University of Chicago, supra*. In that case, in footnote 13, this Court stated:

> Conversely, the Court has been especially reluctant to imply causes of action under statutes that create duties on the part of persons for the benefit of the public at large. (.... U.S. at ...., 99 S.Ct. at 1955.)

Earlier, in that same footnote, the Court had referred to the 1899 Act (through a reference to the *Wyandotte* case) as a statute which "creates a duty in favor of the public at large." (.... U.S. at ...., 99 S.Ct. at 1954.)

Petitioners believe that the Court of Appeals was wrong in rejecting full application of *Amtrak* and *SIPC v. Barbour*, and in ignoring *Cannon v. University of Chicago* and the other cases which will be cited below. The *Wyandotte* case does not insulate the 1899 Act from complete scrutiny pursuant to *Cort v. Ash* and the subsequent explanatory cases.

B. APPLICATION OF THE RULES ENUNCIATED IN THIS COURT'S RECENT DECISIONS DEMONSTRATES THAT THE COURT OF APPEALS ERRED IN FINDING A PRIVATE RIGHT OF ACTION TO ENFORCE THE 1899 ACT.

1. The Language of the Statute and Its Legislative History.

The law is now clear that while the four-part test of *Cort v. Ash* may be utilized by the lower courts, the ultimate question is whether Congress intended to create a private right of action. *Touche Ross & Co. v. Redington*, ... U.S at ...., 94 S.Ct. at 2485 (1979). The language of the statute

itself and its legislative history are the most important elements to be examined. Viewed from either of the two perspectives, the 1899 Act does not authorize private enforcement actions.

The Court of Appeals conceded in its opinion (see quote, *supra*, page 12) that the language of Sections 12 and 17 of the 1899 Act normally would be interpreted as not allowing a private right of action. The language of *Touche Ross & Co. v. Redington, supra*, reinforces this conclusion when it states:

> And where, as here, the plain language of the provision weighs against implication of a private remedy, the fact that there is no suggestion whatsoever in the legislative history that §17(a) may give rise to suits for damages reinforces our decision not to find such a right of action implicit within the section. See *Cort v. Ash, supra*, 422 U.S., at 82-84, 95 S.Ct., at 2089-2091; cf. *Securities Investor Protection Corp. v. Barbour, supra; Amtrak, supra; T.I.M.E., Inc. v. United States*, 359 U.S. 464, 79 S.Ct. 904, 3 L.Ed.2d 952 (1959). (.... U.S. at ...., 99 S.Ct. at 2486-7, footnote omitted.)

The 1899 Act is identical to the *Touche Ross* statute in this regard. The 1899 Act, through Sections 12 and 17 (33 U.S.C. §§406 and 413), places the duty of enforcing the Act on the Department of Justice and the United State's attorneys. Therefore, the plain language weighs against implication of a private right of action. As in *Touche Ross*, there is no legislative history for the 1899 Act suggesting any other result. In fact, the only relevant legislative history produced by any party to this litigation shows that Congress during the legislative process *removed* language which would have allowed private enforcement of the Act.

The Court of Appeals describes this legislative history in footnote 9 of its opinion. (App. p. 15.) It dismisses it as irrelevant, stating that it only disclosed an intent to foreclose private enforcement of the penal provisions of the statute. This is an improperly restrictive reading of the legislative history. The activities of Congress leading to adoption of the Rivers and Harbors Act show that Congress knew how to draft language which would create a private right of action. It had such language in the legislation at one time, but removed it prior to adoption. Further, similar language was not included in any other part of the statute.

Both the clear language of the statute and its history show that the Court of Appeals went beyond permissible limits in its eagerness to reach the merits of this case. It erred in a manner similar to that described in a case decided earlier this term. In *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, ... U.S. ...., 100 S.Ct. 242 (1979) this Court stated:

> While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to effectuate the purposes of a given statute, e.g., *J.I. Case Co. v. Borak, supra,* what must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear. *Touche Ross & Co. v. Redington, supra,* .... U.S., at ...., 99 S.Ct., at 2485; *Cannon v. University of Chicago, supra,* .... U.S., at ...., 99 S.Ct at 1953. (.... U.S., at ...., 100 S.Ct., at 245.)

2. The Especial Benefit Test.

One of the *Cort v. Ash* tests used to discern Congressional intent investigates the question of who was intended as the "especial beneficiary" of the statute in question. (422 U.S.

at 78, 95 S.Ct. at 2088). The Court of Appeals totally overlooked this Court's decision in *Cannon v. University of Chicago, supra,* in analyzing this issue and thereby compounded its interpretive error.

As noted previously (*supra,* p. 13), *Wyandotte* holds that the government is one of the beneficiaries if not the primary beneficiary of the 1899 Act, and *Cannon*, in its footnote 13, reiterates this point when it states that the 1899 Act benefits the general public.

This Court, in *Cannon,* then contrasted statutes which expressly identify a private class that Congress intends to benefit from statutes enacted for protection of the general public. In cases where private rights of action have been inferred, Congress has used words such as "person," "employee," or "representative" to indicate its intent (.... U.S. at ...., 99 S.Ct. at 1954). This Court then continued by stating:

> There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds. . . . (.... U.S. at ...., 99 S.Ct. at 1954-5.)

Section 10 of the 1899 Act is a clear example of the latter kind of statute for which there is far less reason to infer a private right of action. It simply proscribes conduct with no "unmistakable focus" on individual persons. This is why the 1899 Act was used as an example of a statute benefiting the public at large in footnote 13 of the *Cannon* case. (.... U.S. at ...., 99 S.Ct. at 1954-5.)

The Court of Appeals' decision in this case is at complete odds with all the recent private rights of action cases. The effort to ascertain legislative intent was only given lip serv-

ice and relegated to a second priority. In its place, the Court of Appeals gave improper emphasis to its own view that private parties should be allowed to enforce the act. To correct this error, the requested writ should be granted.

C. THE PLAINTIFFS' CLAIMS ARE IN AN AREA TRADITIONALLY RELEGATED TO STATE LAW.

Because the recent cases have emphasized the importance of determining Congressional intent, *Touche Ross*, 99 S.Ct. at 2489, this petition has not yet discussed one factor of the *Cort v. Ash* test, whether the action is one traditionally relegated to state law in an area basically the concern of the states, 422 U.S. at 78, 95 S.Ct. at 2088.

Plaintiffs seek by this action to restrict water supply diversions which are regulated under State water law that represents an exercise of historical State police power. It is clear from a reading of both the trial and appellate court opinions that plaintiffs are not interested in interferences with boating, shipping, commerce, and similar matters which have traditionally been the focus of the 1899 Act. Instead, they are attempting to force the Corps of Engineers to utilize their regulatory authority over navigation, to impose water quality and fish and wildlife protection conditions on water diversion activities of the State of California.

However, the State of California regulates the water diversions that plaintiffs challenge under State water rights appropriation laws that are administered by its Water Resources Control Board. The United States has traditionally relegated that control to the State for more than a century (*Jennison v. Kirk*, 98 U.S. 453 (1879); *California v. United States, supra*).

Furthermore, California control over water rights diversions is based on the exercise of its police powers. *Joslin v. Marin Mun. Water Dist.*, 67 Cal.2d 132, 144 (1967).

California has incorporated that authority directly into Article 10, Section 2 of its Constitution. (See *People v. Forni*, 54 Cal.App.2d 743, 749-50 (1976)). California's Legislature and judiciary have implemented that police power authority through a comprehensive set of provisions for administering water supply diversions. *Environmental Defense Fund v. East Bay MUD*, 26 Cal.3d 183, 194 ff. (1980). Statutes governing water diversion appropriations of the type involved in this case are codified in California Water Code Sections 1200 to 1801. In acting on applications to divert water, the Water Resources Control Board must consider all beneficial uses of the water, including preservation and enhancement of fish and wildlife, recreation and water quality. (Water Code §§ 1243, 1243.5 and 1257.)

California's DWR has obtained WRCB permits to divert waters from the Delta for the SWP, pursuant to these Water Code provisions after lengthy public hearings. Any of the plaintiffs could have filed protests and been heard on the applications (Water Code §§1330-1335). The plaintiff Sierra Club did, in fact, appear and participate in two sets of hearings held in 1969-1970 and 1976-1977 by the State WRCB to limit the SWP and the federal CVP water rights permits, by imposing more specific provisions for fish and wildlife protection and salinity control in the Delta.[2] California's water law allows any interested party to obtain judicial review of Water Resources Control Board decisions in the Superior Court (Water Code Section 1360, Code of Civil Procedure Section 1094.5), and, of course, to appeal the decision to the higher courts (Code of Civil Procedure Section 1110). Thus, ample jurisdiction has existed and has

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[2]These hearings resulted in Decision 1379, issued by the State Water Resources Control Board on July 28, 1971, and Decision 1485, issued in August 1978.

been available to the plaintiffs in the State forum, for the assertion and protection of their interests and claims.

It is abundantly clear, therefore, that the appropriation of waters within California's borders is an activity that is basically the concern of that State, and that the control of that activity has been traditionally relegated to the State. This creates an additional strong reason why, on the facts of this case, the Court of Appeals should not have found a private right of action to enforce Section 10 of the 1899 Act.

D. THERE IS A SUBSTANTIAL SPLIT AMONG THE CIRCUITS CONCERNING PRIVATE RIGHTS OF ACTION UNDER THE 1899 ACT.

There is an important reason, aside from the national interest in proper interpretation of the nation's basic navigable waters statute, for granting a writ of certiorari in this case. It is hard to imagine a more complete split in the Circuits than the one which exists on the issue under consideration.

The Ninth Circuit Court of Appeals relied primarily on two Fifth Circuit opinions, *Neches Canal Co. v. Miller and Vidor Lumber Co.*, 24 F.2d 763 (1928), and *Tatum v. Blackstock*, 319 F.2d 397 (1963) to support its view that a private right of action exists.[3] (App. p. 13.) These two cases clearly stand for that proposition, but contain no analysis of the type now required. As a result of these two cases and the Ninth Circuit opinion which is the subject of this petition,

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[3]The Court of Appeals also relied on *State of Wisconsin v. State of Illinois, supra*. Reliance on that case is misplaced. In that case plaintiffs were complaining of violation of riparian and other rights and the defendant raised an 1899 Act permit as a defense. (287 U.S. at 409-410, 49 S.Ct. at 169.) The case did not involve private plaintiffs suing to enforce the Act.

two circuits have concluded that unlimited private rights of action exist.

A case from a District Court in the Fourth Circuit, *James River and Kanawha Canal Parks, Inc. v. Richmond Metropolitan Authority*, (359 F.Supp. 611 (E.D. Virginia); Affd., 481 F.2d 1280 (1973)), took a more circumspect view, and granted a limited private right of action. It authorized private enforcement by those proving specific injury to enjoin planned construction *before it begins*. The Court went out of its way to limit its holding to the facts before it stating:

> It may be that an injunction ordering the removal of an already constructed obstruction is not available to a private litigant, since this form of relief approaches closely the civil remedy given to the United States. The Court can well see how the hardship which such a removal would normally involve might well have prompted Congress to have phrased the statute so that only the United States, in its discretion, might apply for such relief. An injunction against planned construction, such as that involved in this case, does not suffer from such infirmities, however. (359 F.Supp., at 639.)[4]

The Fourth Circuit affirmed the lower court decision *per curiam*, noting that no questions of standing or jurisdiction had been raised on appeal (481 F.2d at 1281). Had such an issue been raised, we do not know what the result would have been. However, by its affirmation, the Fourth Circuit, *sub silentio*, may have recognized a limited private right of action.

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[4]An injunction against operation of existing facilities is, of course, what was sought in petitioners' case with respect to the Delta and Tracy Pumping Plants. Therefore, this case falls within the exception noted in the *James River* case.

The Second Circuit has not directly ruled on whether private individuals with specific injury can sue to enforce the 1899 Act. However, it has ruled that private parties acting on behalf of the public cannot enforce the Act. In *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81 (1972), a citizens group sought to enjoin a discharge of waste to navigable waters under Section 12 of the 1899 Act. In denying the right of enforcement, the Court set forth policy language which petitioners believe is applicable to any proposed private action:

> [The lawsuit] is obviously intended as a substitute for, and equivalent of, an injunctive action by the Federal Government. The clear congressional purpose, it seems to us, was to concentrate at least this type of public and general enforcement in the Department. If both the Attorney General and private individuals could institute enforcement proceedings, there would only be a difference of degree, between criminal prosecutions and civil injunction suits, in the possibilities of conflict and disruption. A careful federal decision not to seek an injunction because of some general policy, or in view of other means of ending or alleviating the discharge, could be upset by any individual who thought he understood better the needs of the public. We doubt that the 1899 Congress, when it enacted §413, envisaged that the theory of participatory democracy would be carried so far. (457 F.2d at 89.)

Based on this opinion, the Second Circuit seems to lean heavily away from granting private rights of action.

The Third Circuit has ruled that no private right of action exists (*Red Star Towing & Transportation Co. v. Dept. of Transportation of New Jersey*, 423 F.2d 104 (1970)). Although this case was finally decided on Eleventh Amendment grounds, the Court specifically held that Section 12

of the 1899 Act (33 U.S.C. §406) did not create a civil cause of action in favor of private parties (423 F.2d at 105). The Ninth Circuit Court of Appeals' opinion attempts to distinguish *Red Star Towing* because of the Eleventh Amendment issue. However, realizing that this might be insufficient, the Court, ultimately, simply disagrees with the Third Circuit holding. (App., p. 11, fn. 6.)

Finally, and most directly in opposition to the Ninth Circuit view, the Sixth Circuit, in an opinion issued less than three months before the opinion in this case, ruled that private rights of action are flatly inconsistent with the language of the 1899 Act and the most recent Supreme Court opinions. In *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (1979), the Court reviewed all the cases cited in this petition, quoted from them extensively, and ruled that given the statutory language the evidence was insufficient to support a conclusion that Congress intended to create a private right of action (604 F.2d at 1011-12).

What is significant about the *City of Evansville* case is its use of the 1979 Supreme Court cases on private rights of action as the basis of its decision. This is in direct contrast to the Ninth Circuit's opinion which completely fails to analyze or distinguish the same cases. Petitioners believe the Sixth Circuit opinion properly analyzes the law and shows the magnitude of the error by the Ninth Circuit.

Six circuits have considered the issue discussed above and have reached six conclusions which encompass a continuum from complete acceptance of private rights of action, to a limited acceptance of private suits, to rejection of a private right of action. Such broad confusion and conflict on the same matter among so many circuits creates signif-

icant uncertainty on an important federal question. This Court could resolve that uncertainty by granting the requested writ and issuing an authoritative statement of the law.

III.

The Circuit Court's Opinion Preempts State Water Law and Thus Expands the Scope of Section 10 Beyond That Intended by Congress.

The Court of Appeals' opinion extends the 1899 Act beyond its orginal purpose, into matters traditionally relegated to State Law. That extension would significantly expand the manner in which the Government has administered the Act over the past 80 years. It would require the Corps of Engineers to act as a national water rights regulator independently of either navigation burdens or State water rights law. It would also conflict with the Third Circuit's interpretation of Section 10 of the 1899 Act.

The Court of Appeals' expansion of the 1899 Act is premised on three serious defects. First, it relies on a strained technical interpretation of the plain language of Section 10 that has no tangible relevance to the Act's purpose. Second, it, in effect, strikes one of the key words of Section 10. Third, it relies on a selective incorporation of Congressional policy from other statutes, that ignores a much more relevant and pervasive policy expressed both in federal water resource management statutes and recent decisions of this Court.

As a result, the opinion vitiates an important Congressional policy, by subordinating State water rights law to general federal regulation, independently of any substantial impairment of the federal navigation interest. This subordination of a traditionally State concern—the allocation of water rights and the administration of water diversions—to regulation by the U.S. Army Corps of Engineers, severely

undermines the principles of federal-state relationship on which this court based its recent decision in *California v. United States, supra*. It would also duplicate existing State regulatory programs.

This duplicative regulation would result not from application of the 1899 Act but from other recently enacted federal statutes which the Corps of Engineers must follow once 1899 Act jurisdiction attaches. Under the Court of Appeals' decision, *any* alteration of a navigable stream creates federal jurisdiction, even if navigable capacity is unaffected. (App. p. 28.) Once federal jurisdiction attaches, however, the Corps of Engineers may deny a permit even if no obstructions are created if, under the requirements of the National Environmental Policy Act and similar federal statutes, it determines that non-navigational considerations such as water quality and fish and wildlife protection are impaired. *Zabel v. Tabb*, 430 F.2d 199, 211 (5th Cir., 1970). (App. p. 24.)

California has adopted its own comprehensive environmental protection (Cal. Public Resources Code, §21000, *et seq.*) and water quality (Cal. Water Code, §13000, *et seq.*) statutes. It vigorously applies these statutes to all water diversions within the state. The Court of Appeals' decision would allow the Federal Government to veto all decisions made by the State of California involving its totally intrastate water project, even if no federal navigation interest is affected. Such a decision improperly distorts the intent of the 1899 Act and seriously undermines the State's control over its water resources.

A. THE CIRCUIT COURT'S OPINION RELIES ON A STRAINED TECHNICAL INTERPRETATION OF SECTION 10 THAT DOES NOT FURTHER THE PURPOSE OF THE 1899 ACT.

The Ninth Circuit's opinion stretches the plain meaning of the third clause of Section 10 of the 1899 Act (see App.

pp. 27-28, 39) and thereby expands its scope beyond its original purpose, in a manner that preempts existing Congressional policy. There is no sound reason for that preemption in either the Act itself, or in this Court's previous decisions.

In making this assertion, petitioners are not insisting on the narrowest possible definition of navigable capacity as the Court of Appeals' opinion charges. (App. p. 28, n. 24.) Neither do we dispute that Congress possesses broad power to protect navigation, and to subordinate State law to implement that power, as the opinion suggests. (App. p. 38.) However, in the area of water diversion law, Congress has tempered its exercise of power by deferring to State water law in the absence of direct inconsistency with federal statutes. *California v. United States, supra*. The plain language of the 1899 Act is not inconsistent with that deferral, and the Court of Appeals should not stretch the Act in order to make it inconsistent.

Furthermore, the fact that the 1899 Act does not explicitly mention noninterference with State water law is not controlling, as the opinion also suggests. (App. p. 36.) That suggestion ignores the decisions of this Court in analogous situations that limit federal preemption of State laws and implied repeal of federal statutes.

1. The Statute.

Congress enacted Section 10 of the 1899 Act to regulate the creation of obstructions to navigation caused by altering the physical structures[5] that enclose the Nation's navigable waterways. Since common law did not regulate those obstructions, Congress had been forced to enact legislation to

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[5]The term "physical structures" refers both to natural or artificial features, such as banks, beds, channels, and levees which define the boundary of specific navigable waters.

protect navigation, which at that time represented a major percentage of the Nation's transportation system, *Williamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 8 S.Ct. 811 (1888); *Hubbard v. Fort*, 188 Fed. 987 (1911). 32 Cong. Rec. 1350-51 (1899). Subsequent case law has added to the types of activities originally covered by the Act, nonstructural operations which substantially interfere with the navigable capacity needed to support recognized navigation. *Sanitary Dist. of Chicago v. United States, supra.*

The Court of Appeals' opinion, however, concludes that Section 10 applies not only to actions which alter the physical structure enclosing navigable waters, but also to the nonstructural activities such as water supply diversions, even if those activities are not shown to affect navigation. (App. pp. 28, 39.) The opinion bases this conclusion on a selective interpretation of the third clause of Section 10, which in effect, edits the word "channel" out of the statutory language. It does not even address the limitation inherent in the use of that term. Indeed, the opinion describes the test for Section 10 coverage of the State's water diversions as "Whether there has been any modification or alteration of the condition or capacity of a navigable stream." (App. p. 28.)

While previous decisions have given an expansive meaning to the term "channel", they have invariably construed it as referring to the physical bed of a stream, bay or sound, rather than to the waters which it encloses. *Oklahoma v. Texas*, 258 U.S. 574, 593-594, 42 S.Ct. 406, 414. The Circuit Court's opinion, however, assumes that Section 10 includes changes solely in the flow characteristics of the water carried in a channel. It, therefore, concludes that the 1899 Act applies to every nonstructural modification of the water levels or other flow characteristic of a navigable stream. (App. pp. 39, 54, 118, 119, n. 62.)

2. The Cases.

The Court of Appeals supports its generous interpretation of Section 10 by cases that involve either changes in a physical structure enclosing navigable waters, or substantial burdens on navigation. But these precedents are not applicable to the present controversy.

a. The Changed Channel Cases.

Most of the cases on which the Court of Appeals relies involved situations where activities physically changed the structure of the bed underlying navigable waters. (App. pp. 24, 31-33.) Although these changes were not shown in every case to directly affect navigation, they easily fell within the plain language of Section 10. The Ninth Circuit, in spite of the fact that these cases involved physical alteration of a channel or shoreline, made a logic leap and concluded that they established "beyond cavil that an alteration or modification of navigable waters is sufficient to trigger the permit requirements of Section 10," (App. p. 32.) That interpretation is particularly misplaced because it relies specifically on *United States v. Moretti* (*Moretti I*), 478 F.2d 418, 429 n. 37 (5th Cir. 1973). However that decision expressly limited its holding to "any *filling* of navigable waters", *Id.*

b. Navigation Burden Cases.

The Court of Appeals relied on two other types of cases for its expansive interpretation of Section 10. One type involves the factual situation where there is a clear demonstration of substantial impairment of commercial navigation. In the other type, this Court articulated a factual navigation impairment test for situations where the Attorney General initiates injunctive proceedings.

(i) *Great Lakes Cases.*

The Ninth Circuit's opinion places its primary reliance on two decisions of this Court that dealt with sewage dilution diversions from Lake Michigan, *Sanitary Dist. v. United States, supra*, and *Wisconsin v. Illinois, supra*. Not only were those diversions not based on state authorized and regulated water rights, but they also resulted in extensively documented impairment of major commercial navigation on at least four of the Great Lakes. They reduced the annual Great Lakes shipping capacity by over three million tons, valued at the time at a cost of 88 cents per ton. That impairment affected seven states, an international treaty with Great Britain, four hundred harbors, and a hundred federally improved channels, 278 U.S. at 407-409, 49 S.Ct. 167-169; 266 U.S. at 423, 426; 45 S.Ct. at 177-179.[6]

(ii) *United States v. Rio Grande.*

The Court of Appeals also relied on *United States v. Rio Grande, supra*. That decision, although enjoining storage of water on a non-navigable upstream portion of the Rio Grande River, did give serious consideration to the Congressional policy of deferring to State water rights law.

This Court went out of its way in *Rio Grande* to limit its impact on activities which otherwise would have only local significance and which normally present no federal issues to situations where actual obstructions to needed navigable

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[6]Petitioners submitted to the Court of Appeals for Judicial Notice, excerpts from the following public documents that are filed with this Court in *Sanitary District v. U.S., supra:*

1. Pages 92 to 94 and 118 and 119 of the General Index to the Transcript of Record, Volume A
2. Index pages I to V and pages 87 to 117 of the Brief for Appellee United States
3. The Amicus Curiae Brief of the Lake Carriers Association.

If petitioners' writ is granted, we will resubmit to this Court, our original Motion Requesting Judicial Notice.

capacity are demonstrated. (174 U.S. at 704, 19 S.Ct. at 775, 777), stating:

> It does not follow that the courts would be justified in sustaining any proceeding by the attorney general to restrain any appropriation of the upper waters of a navigable stream. The question always is one of fact, whether such appropriation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact. (174 U.S. at 709, 19 S.Ct. at 777.)

Rio Grande clearly articulated the policy which existed when Congress adopted the 1899 Act and which Congress has continued to follow. That policy is that federal statutes should not be construed to grant federal regulatory control over state regulated water rights diversions, unless those diversions alter flows in a manner that impairs substantially the stream's capacity to support established navigation. The Court of Appeals' opinion failed to apply this policy, and thereby authorized the United States to involve itself in any diversion of water from a navigable stream.

(iii) *The Navigation Burden Test.*

A specific test for determining whether a challenged activity constitutes a burden on navigation for purposes of Section 10 was formulated and applied in *United States v. Bigan*, 170 F.Supp. 219 (W.D. Penn. 1959), affirmed 274 F.2d 729 (3rd Cir. 1960). That decision concludes that an alleged obstruction to navigable capacity of the type specified in the first clause of Section 10 requires a tangible showing of navigational impairment, especially if the obstruction is not delineated in the second or third clauses. Indeed, to justify abatement of an alleged obstruction to navigable capacity, as plaintiffs seek in this case, more must be shown than the mere possibility of future injury to nav-

igation. The navigational impairment must be imminent and the requested abatement action must be needed to avoid irreparable injury to navigation. 170 F.Supp. at 225-26, 274 F.2d at 733.

Application of the *Bigan* test to the record in this case would demonstrate that the State's challenged diversion of waters from the Delta does not constitute an obstruction to navigable capacity within the meaning of Section 10. The Third Circuit's interpretation of the scope of the first clause of Section 10, therefore, conflicts with the Ninth Circuit's interpretation. (App. pp. 26, 27.) That conflict creates serious uncertainty in a vital area of federal law. By this petition, we request this Court to resolve that conflict by adopting the Third Circuit's interpretation.

B. THE CIRCUIT COURT'S OPINION VITIATES IMPORTANT CONGRESSIONAL POLICY.

1. Rejection of the Policy.

The Court of Appeals incorporates Congressional policy from other federal statutes to justify its strained interpretation of Section 10. However, it refuses to incorporate more relevant, and indeed more current, Congressional policy established in numerous federal water resource statutes. As a result, the opinion circumvents the long-standing Congressional policy of preserving state jurisdiction over water rights allocations. It, therefore, vitiates much of that policy, because much, if not most, of the nation's public water supplies are diverted from surface streams.[7]

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[7]Over 300 billion gallons of fresh water are diverted from the nation's surface streams each day, *The Nation's Water Resources 1975-2000: Second National Water Assessment by The U.S. Water Resources Council*, Volume 1 (1978), pp.18 and 29. Currently, State and local agencies administer nearly all of those diversions, *The Nation's Water Resources: First Annual Assessment of the Water Resources Council (1968), p. 5-1-1.*

The Court of Appeals' opinion literally destroys the States' control over these critical resources and Congressional deferral to that control, by holding that any technical alteration of navigable waters triggers Section 10 permit jurisdiction even if that alteration does not impair navigation.

However, the Fifth Circuit dredge and fill cases, on which the Court of Appeals relies (App. pp. 24, 32), rely in turn on policy considerations in other federal statutes (*Zabel, supra,* at 208-214; *Moretti I, supra,* at 429). While those policy considerations may be relevant in unregulated dredge and fill cases, they are much less relevant in this case. As noted previously, California already imposes strict environmental controls on Delta water export operations, through its regulation of water diversion rights (Calif. Water Code §§1243, 1243.5, 1255, 1257 and 1258); *EDF v. East Bay MUD, supra* and through its environmental quality act (Calif. Public Resources Code Section 21000, *et seq.*) There is, therefore, no reason to thrust the Corps of Engineers into the water diversion regulation business when federal navigational interests are absent. But this is precisely what the Court of Appeals' decision does.

On the other hand, the Court of Appeals refused to consider the well-defined Congressional policy which is incorporated in at least three dozen federal water resources statutes that are just as relevant to this case as the environmental statutes were to the Fifth Circuit cases. (App. p. 33, n. 26.) That refusal is particularly insupportable in light of this Court's recent recognition of the history of Congressional intent in the field of federal-state jurisdiction over the allocation of waters, and its general deference to State water rights law, *United States v. New Mexico,* 438 U.S. at 701-702, 98 S.Ct. at 3015; *California v. United States,* 438 U.S. at 678-679, 98 S.Ct. at 3002-3003. Those two decisions

clearly recognize that Congress considers water supply diversions as matters traditionally relegated to State law. However, none of the Fifth Circuit cases involved issues of federal-state water jurisdiction that are so central to this case. Consequently, the courts in those cases did not consider the Congressional policy of deferring to State water law, in the absence of a tangible inconsistency with a clear federal interest.

The Court of Appeals' opinion interprets *California v. United States* very narrowly. Indeed, it appears to limit that decision to "the context of federal *reclamation* projects". (App. pp. 35-36.) That limitation manifests a serious misreading not only of *California v. United States,* but also of this Court's concurrent decision in *United States v. New Mexico*. The latter decision was not a reclamation act case, but it still recognized the same Congressional deference to State water law as did *California v. United States*. Furthermore, *California v. United States* itself cites a non-reclamation act statute, the McCarren Amendment, as "the most eloquent expression of the need to observe State water law." That Act subjects the United States to state court jurisdiction for general stream adjudication of water diversion rights, 438 U.S. at 678, 98 S.Ct. at 3002. (App. p. 140.)

Apparently, the Court of Appeals also considers 37 other federal statutes deferring to State water law as essentially limited to reclamation projects (App. pp. 33-36) and, therefore, inapplicable to a navigation statute. However, less than a third of those acts are reclamation act statutes. The relevant portions of those statutes are set forth on pages 131-151 of the Appendix to this petition, with asterisks identifying the Reclamation Act Statutes. The non-reclamation act statutes cover a broad spectrum of water supply, water quality, and water rights adjudication matters, that

have direct application to navigable waters. Indeed, Congress has continued to reassert its policy of deferring to State water law, in water resource legislation enacted after the District Court filed its opinion in this case.

Congress' most recent reassertion of its deference to State water law occurred in the 1977 amendments to the Federal Water Pollution Control Act, 33 U.S.C. §1251, *et seq.* (retitled as the Clean Water Act). (App. p. 150.) That Act now contains the following reaffirmation of Congress' long-standing policy of deferring to State water law:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. (33 U.S.C. §1251(g).)

2. Preemption Analogy.

The Court of Appeals also bases its refusal to incorporate the Congressional policy of deferring to State water law, on the fact that the 1899 Act does not itself mention non-interference with State-authorized water supply diversion operations. (App. p. 36.) However, in analogous situations, involving other federal statutes, this Court has deferred to State law, where that deferral would not impair basic federal responsibilities, *Linn v. United Plant Guard Workers*, 383 U.S. 53, 59-61, 86 S.Ct. 657, 661-662 (1966). (National Labor Relations Act, 29 U.S.C. §141, *et seq.*); *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 144, 83 S.Ct. 1210, 1218 (1963), (Federal Agricultural Adjustment Act, 7 U.S.C. §601, *et seq.*)

This Court has not required an express statutory statement of noninterference with State law, in order to limit federal preemption of State law. Instead, it has refused to infer federal statutory preemption of State law without an unambiguous Congressional mandate to that effect, particu-

larly where the State law represents, as it does here, an exercise of historic State police power, 383 U.S. at 59, 86 S.Ct. at 661; 373 U.S. at 146, 83 S.Ct. at 1219.

In the present case, the continued deference to State water rights law does not stand as an obstacle to the accomplishment and execution of the basic purposes and objectives of the 1899 Act, so long as regulation of water rights diversions is limited to cases involving substantial interference with navigable capacity required to support established navigation. *United States v. Rio Grande, supra.* Indeed, State water rights laws have coexisted with federal regulation of navigation for 80 years, without any significant conflict between the two regulatory schemes.

Even more importantly, the plaintiffs have not presented any evidence of Congressional intent to preempt the field of water rights law. Instead, there is ample evidence to the contrary, that Congress in fact intends to recognize and protect State water rights jurisdiction over water supply diversions from navigable waters in the absence of any substantial impairment of established navigable capacity.

3. Implied Repeal.

Finally, the Circuit Court's rejection of the Congressional policy articulated in the 38 statutes recited in the Appendix impliedly repeals a significant portion of that policy, and, in fact, partially repeals some of those statutes. For example, Section 301(a) of the Water Supply Act of 1958 (App. p. 145) states the following general policy applicable to all federal agencies:

> It is hereby declared to be the policy of the Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes and that the Federal Government should participate and

> cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects.

The Circuit Court's opinion would impliedly repeal that statute, at least as it applies to navigable waters. It would transfer primary authority for regulating water supply diversions from navigable streams, to the Federal Government. Accordingly, it would preclude the states from exercising one of their primary responsibilities for developing navigable water supplies, namely the authority to allocate rights to the use of those supplies.

However, the principles of statutory interpretation do not favor repeals by implication. *United States v. Borden Co.*, 308 U.S. 188, 198, 60 S.Ct. 182, 188 (1939); *General Electric Credit Corp. v. James Talcott Inc.*, 271 F.Supp. 699, 704-05 (S.D. N.Y., 1966). There is, indeed, a judicial duty to give effect to both the old (1899 Act) and new (1958 Water Supply Act) statutes, absent a repugnancy between the statutes. *United States v. Healey*, 160 U.S. 136, 146, 16 S.Ct. 247, 251 (1895); *United States v. Jackson*, 302 U.S. 628, 631, 58 S.Ct. 390, 392 (1938).

IV.

The Court of Appeals Erroneously Limited the Authorization Contained in the Section 10 Permits That the United States Issued to the State for Clifton Court Forebay, Prior to the Filing of This Action.

The Court of Appeals' opinion rejects the Section 10 permit that the Corps issued to DWR for connecting Clifton Court Forebay to the Delta, as adequate Section 10 authority for the SWP's water diversions from the Delta. (App. pp. 50-51.) This was done in spite of the fact that these physical

structures were installed for the sole purpose of allowing the State to make those diversions.

Surprisingly, however, the opinion also rules that the Corps has adequate authority under that permit to regulate the State's operation of the Delta Pumping Plant. (App. p. 51, n. 37.) The Court of Appeals invokes that regulatory authority from the terms of the permit itself, and from the Corps' regulations. The permit contains a condition that if the Secretary of the Army determines that the structure connecting Clifton Court Forebay to the Delta causes:

> . . . unreasonable obstruction to the free navigation of said water, [DWR] will be required upon due notice from the Secretary of the Army, to remove or alter the structural work or obstructions caused thereby without expense to the United States, so as to render navigation reasonably free, easy, and unobstructed . . . . (Permit No. 4101.)

Apparently, the Court of Appeals agrees that that condition provides the federal regulatory authority necessary to protect navigation, even though it limits federal involvement to that needed to correct unreasonable obstructions to navigation. As indicated above, that limitation is flexible enough to allow responsible regulation of SWP diversions under State water law, and still assure protection for navigation.

The Court of Appeals also concludes that adequate federal authority for regulating SWP water diversions exists under the present permit, through regulations that allow the Corps to initiate action to "modify, suspend, or revoke" that permit, upon a reevaluation of circumstances. (App. p. 51 n. 37.) Consequently, the opinion's analysis does not support its conclusion that the State's existing Section 10 permit does not adequately protect the federal navigation responsibility.

Conclusion.

For the foregoing reasons, the opinion of the Court of Appeals in this case, (1) conflicts with the decisions of at least two other Courts of Appeals on whether a private right of action exists under the Rivers and Harbors Act of 1899; (2) has decided important questions of federal law relating to the application of Section 10 of that Act to water supply diversions that have not been, but should be, settled by this Court; and (3) has decided a federal question relating to the applicability of that Section to State water law, in a way that conflicts with applicable decisions of this Court. Because the foregoing reasons are special and important, Petitioners respectfully request that the writ for *certiorari* be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term 1979

No. . . . . .

79-1502

KERN COUNTY WATER AGENCY, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, SANTA CLARA VALLEY WATER DISTRICT AND TULARE LAKE BASIN WATER STORAGE DISTRICT,

Petitioners,

vs.

SIERRA CLUB, *et al.*,

Respondents.

Appendix to Petition for Writ of Certiorari.

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APPENDIX 1.

Section 9, Rivers and Harbors Act of 1899:

"Construction of bridges, causeways, dams or dikes generally.

"It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army. *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided further,* that when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army." 33 U.S.C. § 401.

Section 10, Rivers and Harbors Act of 1899:

"Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in.

"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited;

and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to

Section 12, Rivers and Harbors Act of 1899:

Penalty for wrongful construction of bridges, piers, etc.; removal of structures.

Every person and every corporation that shall violate any of the provisions of sections 401, 403, and 404 of this title or any rule or regulation made by the Secretary of the Army in pursuance of the provisions of section 404 of this title shall be deemed guilty of misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper porceedings to this end

may be instituted under the direction of the Attorney General of the United States. 33 U.S.C. § 406.

Section 17, Rivers and Harbors Act of 1899:

Duty of United States attorneys and other Federal officers in enforcement of provisions; arrest of offenders.

The Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of sections 401, 403, 404, 406, 407, 408, 409, 411, 549, 686, and 687 of this title; and it shall be the duty of United States attorneys to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of the Army or by any of the officials hereinafter designated, and it shall furthermore be the duty of said United States attorneys to report to the Attorney General of the United States the action taken by him against offenders so reported, and a transcript of such reports shall be transmitted to the Secretary of the Army by the Attorney General; and for the better enforcement of the said provisions and to facilitate the detection and bringing to punishment of such offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of the Army, and the United States collectors of customs and other revenue officers shall have power and authority to swear out process, and to arrest and take into custody, with or without process, any person or persons who may commit any of the acts or offenses prohibited by the said sections, or who may violate any of the provisions of the same: *Provided*, That no person shall be arrested without process for any offense not committed in the presence of some one of the aforesaid officials: *And*

provided further, That whenever any arrest is made under such sections, the person so arrested shall be brought forthwith before a commissioner, judge, or court of the United States for examination of the offenses alleged against him; and such commissioner, judge, or court shall proceed in respect thereto so authorized by law in case of crimes against the United States. 33 U.S.C. § 413.

APPENDIX 2.

[610 F2d 581]

SIERRA CLUB, a non-profit California Corporation, et al., Plaintiffs-Appellees, v. Cecil D. ANDRUS,* as Secretary of the Interior of the United States, et al., Defendants-Appellants, Kern County Water Agency, a public agency, et al., Intervenors-Appellants.

Nos. 76-1464, 76-1494, 76-1534, 76-1651, 76-1663 and 76-1981.

United States Court of Appeals, Ninth Circuit. Oct. 31, 1979. Rehearing Denied Jan. 17, 1980.

Walter E. Wunderlich, Deputy Atty. Gen., Dept. of Justice, Sacramento, Cal., for defendants-appellants.

Robert Thum, San Francisco, Cal., on brief; John Clark, San Francisco, Cal., for plaintiffs-appellees.

Appeal from the United States District Court for the Northern District of California.

Before ELY, TRASK, and TANG, Circuit Judges.

ELY, Circuit Judge:

These appeals stem from the efforts of two environment associations and two private citizens[1] to control the pumping of water from the Sacramento-San Joaquin Delta (the Delta) into the canals and aqueducts of the California Water Project. The facts are reported fully in the excellent opinion of

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*Mr. Andrus is the present Secretary of the Interior. He has been substituted as an appellant for one of his predecessors who was originally named as a party in his official capacity. Rule 43(c) Fed.R.App.P.

[1]The appellees, plaintiffs below, are the Sierra Club, a nonprofit California corporation having in excess of 130,000 members, of whom more than 40,000 are in the San Francisco Bay and Sacramento-San Joaquin Delta areas; Friends of the Earth, a nonprofit New York corporation that has its principal place of business in San Francisco; Hank Schramm, a commercial fisherman active in the San Francisco Bay and the Pacific Ocean; and William Dixon, a Sacramento-San Joaquin Delta landowner.

District Judge Renfrew. *Sierra Club v. Morton*, 400 F.Supp. 610 (N.D.Cal. 1975). After the first phase of a bifurcated trial the District Court ordered the federal[2] and state[3] defendants to obtain authorization for the operation of their pumping plants from the United States Army Corps of Engineers (the Corps), pursuant to section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1970). The court also ordered the Secretary of the Army to prepare an environmental impact statement prior to the issuance of such authorization. *Id.* at 651. In addition, the court enjoined construction on the proposed Peripheral Canal until an environmental impact statement was prepared and authorization from the Corps was obtained. The Peripheral Canal would transfer water directly from the Sacramento River to a point close to the pumping plants. Since the trial court

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[2]The named federal appellants, the defendants below, were federal officers who administer the various agencies responsible for overseeing the operation, construction, and regulation of the facilities in question. They were Rogers C.B. Morton, Secretary of the Interior; Gilbert Stamm, Commissioner of the Bureau of Reclamation; Howard H. Callaway, Secretary of the Army; William C. Gribble, Jr., Chief of Engineers of the South Pacific Division of the United States Army Corps of Engineers; Col. Frederick J. Rockwell, District Engineer of the Army Corps of Engineers for the Sacramento, California District; and Col. James L. Lammie, District Engineer of the Army Corps of Engineers for the San Francisco, California district. Because all of these individuals were sued in their official capacity, their successors are automatically substituted as some of the appealing parties. Fed.R.App.P. 43(c).

[3]The named state defendants in the District Court were Norman B. Livermore, Jr., Secretary for Resources; and John R. Teerink, Director of the Department of Water Resources. Like the federal parties, the named state appellants were sued in their official capacity, and their successors are automatically substituted as parties to the appeal in this court. Fed.R.App.P. 43(c).

The District Court also allowed the Kern County Water Agency, the Metropolitan Water District of Southern California, the Tulare Lake Basin Water Storage District, and the Santa Clara Valley Water District to intervene in these actions. The intervenors are public agencies of the State of California that have contracted for water from the California Water Project and have undertaken extensive financial obligations in reliance thereon.

has not yet conducted the relief phase of the bifurcated trial, it has not yet determined whether the appellees are entitled to further relief; accordingly, it has allowed the continuing operation of the pumping plants.

Here, the federal and state parties present five principal arguments. First, they contend that the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401-418 (1970) (the Act), does not create a private right of action, and that, therefore, only the United States can enforce the permit requirements of section 10.[4] Second, they contend that even if a private right of action exists, the appellees lacked standing to institute their suit. Third, it is asserted that section 10 does not apply to the pumping of water from the Sacramento-San Joaquin Delta; and fourth, if compliance with section 10 is required, such compliance already exists. Finally, the federal parties argue that since their plant, the Tracy Pumping Plant, was fully operational before the enactment of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (1970 & Supp. V 1975), no environmental impact statement

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[4]Section 10 of the Rivers and Harbors Act of 1899 provides:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

33 U.S.C. § 403 (1970).

is necessary if a section 10 permit is required. Neither the federal nor the state parties challenge the District Court's ruling concerning the Peripheral Canal.

We have concluded that a private right of action should be implied on behalf of parties who seek to enforce compliance with the permit requirements of section 10 of the Act and that three of the four plaintiffs, having alleged particularized injuries, possess the requisite standing to avail themselves of that right. We agree with the District Court that the pumping of Delta water falls within the broad reach of section 10 and that the state parties have been exporting Delta water in violation of that provision. Unlike the District Court, however, we believe that Congress authorized the present operational level of the federal pumping plant, thereby excusing its operators from the section 10 permit requirement. Because of this second conclusion, we do not reach the final issue, i.e., whether the federal parties would be legally required to prepare an environmental impact statement before granting a section 10 permit for the federal pumping plant. We therefore affirm in part and reverse in part.

I. FACTS

The federal and state pumping plants are integral elements of the Central Valley and State Water Projects, which, together, constitute the California Water Project. The Central Valley Project, administered by the United States Bureau of Reclamation, consists of dams, reservoirs, pumping plants, canals, and other facilities designed to generate hydroelectric power, provide flood control, and supply water for irrigation and other uses in the Central Valley of California. To this end, water from the winter runoff is stored behind dams in the Sacramento River and then released, as needed, to flow down river and into the Sacramento-San

Joaquin Delta, where it merges with other Delta waters. The Tracy Pumping Plant, a principal component of the Central Valley Project, pumps water from the Delta into the Delta-Mendota Canal, a 115-mile canal leading to the Mendota pool in the Central Valley. The pumping capacity of the Tracy Pumping Plant is 4,602 cubic feet per second. In 1973 this plant pumped 2,127,341 acre-feet of water from the Delta.

The State Water Project, created by the Burns-Porter Act of 1959 and now codified in Cal. Water Code §§ 12930-12942 (West 1971), is the state analogue to the Central Valley Project. It also consists of dams, canals, pumping plants, and other facilities designed to generate power, provide flood control, and transfer water from the Delta to the more arid regions of central, coastal, and southern California. The state pumping plant, known as the Delta Pumping Plant, is central to the operation of this water project. Like the Tracy Pumping Plant, it withdraws water from the Delta, pumping it into a canal, where the water ultimately is permitted to flow to its place of use. The pumping capacity of the Delta Pumping Plant is now approximately 6,300 cubic feet per second. This capacity can be increased to approximately 10,300 cubic feet per second by the installation of additional pumping units, and it is contemplated that the first of these pumps will in fact be operational by 1980. In 1973 the Delta Pumping Plant withdrew 1,261,120 acre-feet of water from the Delta. The State of California, through its Department of Water Resources, has already entered into contracts providing that at some future time the State Water Project will annually deliver 4,230,000 acre-feet of water, of which 95 percent will be pumped by the Delta Pumping Plant. With the addition of the Peripheral Canal the potential withdrawal of Delta water by both the Tracy and Delta Pumping Plants will increase to approximately 7,000,000

acre-feet in 1990 and approximately 7,750,000 acre-feet by 2020.

The pumping, past and present, has had a significant impact upon the Delta. The District Court found

> that export pumping by these facilities both lowered Delta water levels and at certain times caused net flow reversals in Delta waterways. Although it is true that the exact magnitude of these effects was not precisely established, it is clear that they are far from any sort of *de minimus* exception. . . .

400 F.Supp. at 632.[5] Before we address whether this impact falls within the Corps' regulatory jurisdiction under section 10, it is obvious that we must first determine whether plain-

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[5]Because the Delta water flows in San Francisco Bay and is directly affected by the tidal cycle, water in the Delta channels and rivers tends to flow both up channel and down channel during the tidal cycle. For any given tidal cycle, however, there is a greater volume of flow in one direction. The amount of this excess is the net flow. A net flow reversal occurs when the net flow for a given tidal cycle is in a different direction from that of the normal direction.

The District Court considered several studies of the effect of the pumping on Delta water levels. A 1968 study, conducted by varying the pumping rates of the Tracy Plant and measuring the actual effect on water levels at various points, concluded that Delta water levels near the inlet channel of the plant were lowered .1 foot per 1000 cubic feet per second pumped. Effects of the pumping were detected as far away as the San Joaquin and Sacramento Rivers. Another study measuring the combined effect of the Tracy and Delta Plants concluded that diversion of between 9,600 cubic feet per second and 12,000 cubic feet per second during both high high and low high tides resulting in a lowered water level of 1.0 to 1.5 feet at one location near the pumping plants and almost .1 foot at a location on the San Joaquin River.

The District Court found that the above figures represented the minimum effect of the pumping plants on Delta water levels and that it was "highly probable if not certain" that an increase in the amount of pumping would result in greater effects. 400 F.Supp. at 631.

tiffs, as private individuals, can enforce the permit requirements of that section.[6]

II. PRIVATE RIGHT OF ACTION

To determine whether a statute contains an implied private remedy, a court should consider four separate questions. First, is the plaintiff a member of the "class for whose especial benefit the statute was enacted?" *Texas & Pacific Railway Co. v. Rigsby,* 241 U.S. 33, 39, 36 S.Ct. 482,

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[6]Prior case law has not definitively resolved the issue. Recently, our Circuit recognized an implied private right of action for damages caused by the negligent operation and maintenance of a bridge over navigable waters, alleged to constitute violations of both section 10 and a provision of the Bridge Act of 1906, 33 U.S.C. § 512 (1970). *Riggle v. California,* 577 F.2d 579 (9th Cir. 1978). Although *Riggle* did not involve either the permit requirement of section 10 or injunctive relief, that decision strongly supports our reading of the Act. See 577 F.2d at 582-83.

On the other hand, in general terms the Third Circuit has stated that Congress, in exercising its regulatory authority over navigation, did not "create any civil cause of action in favor of private parties injured by any violation of the Act." *Red Star Towing & Transp. Co. v. Department of Transportation of New Jersey* 423 F.2d 104, 105 (3d Cir. 1970). That case, however, presented a different issue, whether the 1899 Rivers and Harbors Act abrogated the eleventh amendment immunity of a state from suit in admiralty. According to the Third Circuit, Congress did not intend such a result. Id. at 106; cf. *Williamson Towing Co. v. Illinois,* 534 F.2d 758 (7th Cir. 1976) (regulation under Bridge Act of 1906, 33 U.S.C. §§ 491-498 (1970), does not abrogate state immunity from suit in admiralty); *Intracoastal Transp., Inc. v. Decatur County,* 482 F.2d 361 (5th Cir. 1973) (same). *But cf. Chesapeake Bay Bridge & Tunnel Dist. v. Lauritzen,* 404 F.2d 1001, 1003 (4th Cir. 1968) (state immunity abrogated by reason of regulation under the Rivers and Harbors Act of 1899).

Here, an eleventh amendment issue is not present because appellees sought only injunctive relief requiring the State to conform its conduct to the requirements of a federal statute. See *Edelman v. Jordan,* 415 U.S. 651, 664, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). To the extent that *Red Star Towing* may be construed as holding that no private right of action exists under section 10, we disagree. *Cf. Libby Rod and Gun Club v. Poteat,* 594 F.2d 742 (9th Cir. 1979) (*sub silentio* recognition of private cause of action under section 9 of the Act) *see discussion of Libby Rod and Gun Club* at note 36, *infra*).

484, 60 L.Ed. 874 (1916). Second, is there any indication of legislative intent, explicit or implicit, either to create or to deny a private right of action? Third, do the underlying purposes of the legislative scheme conflict with private enforcement of the act? Fourth, and last, "is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975); *see Piper v. Chris-Craft Industries*, 430 U.S. 1, 37-41, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 95 S.Ct. 1733, 44 L.Ed.2d 263 (1975); *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 457-458, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974); *Starbuck v. City & County of San Francisco*, 556 F.2d 450, 454 (9th Cir. 1977).

Although we have found no hard and precise indication of a congressional intent to create or deny a private remedy under section 10, we believe, without significant doubt, that such a remedy does exist. The plaintiffs below are members of a class for whose benefit Congress enacted the statute, and implication of a private remedy is both consistent with the purposes of the Act and complementary to its enforcement.

A. *Beneficiaries of the Rivers and Harbors Act*

The plaintiffs in this case who use the Delta and the San Francisco Bay also belong to the class for whose especial benefit the statute was enacted. Long ago, in 1888, the Supreme Court decided that federal common law did not prohibit obstructions and nuisances in navigable waters of the United States. *Willamette Iron Bridge Co. v. Hatch*,

125 U.S. 1, 8 S.Ct. 811, 31 L.Ed. 629 (1888). Therefore, the Court held that a private party could not obtain an injunction against the construction of a bridge over a navigable water. Congress promptly responded by enacting section 10 of the Rivers and Harbors Act of 1890, 26 Stat. 426, 454, which forbids obstructions not affirmatively authorized by law. This section, with minor changes, became section 10 of the 1899 Act. Since that time, courts have granted relief to private parties who suffer special injury because of unauthorized obstructions. For example, in *Neches Canal Co. v. Miller & Vidor Lumber Co.*, 24 F.2d 763 (5th Cir. 1928), a lumber company sued to recover losses caused by the construction of an unauthorized sand dam in the Neches River. The company recovered the expense it had incurred in raising its logs, which had sunk in the river because of the obstruction. In *Tatum v. Blackstock*, 319 F.2d 397 (5th Cir. 1963), a landowner with property adjacent to navigable waters sought to enjoin unauthorized dredging and filling, which would have altered the flow of the navigable waters to the detriment of his property. The court upheld a preliminary injunction against further activity until the Corps of Engineers issued a permit. Recently, our own court remanded for trial one of the consolidated appeals in *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978), in which a private association contended that diked evaporation ponds in and around Bair Island in San Francisco Bay were built in violation of the Act because Corps permits had not been obtained.[7]

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[7]The intervening state water agencies contend that the Act is meant to benefit only those who are involved in navigational pursuits. The cases cited above amply refute the contention that the Act is so limited. All *users* of navigable waters are beneficiaries of the Act.

The federal parties argue that only the federal government is a beneficiary of the Act, relying upon an isolated statement of the Supreme Court in *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 201, 88 S.Ct. 379, 386, 19 L.Ed.2d 407 (1967), that "a principal beneficiary of the Act, if not the principal beneficiary, is the Government itself." *Wyandotte*, however, does not preclude private parties from also being recognized as beneficiaries of the Act.[8] Indeed, the Court's pronouncement, which expressly leaves open the class for whose benefit the Act was passed, was made in the context of expanding, not contracting, the remedies under the Act. As the District Court succinctly stated, "Sections 9 and 10 were enacted both to prevent injuries to private parties as a result of obstructions to navigable capacity which were not authorized by the United States and to allow the United States to regulate obstructions to the navigable capacity of its navigable waterways." 400 F.Supp. at 623 (footnote omitted).

B. *Legislative Intent*

The legislative history of the Rivers and Harbors Act of

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[8]The Supreme Court, itself, at least *sub silentio*, has recognized others as beneficiaries of the Act. In *Wisconsin v. Illinois*, 278 U.S. 367, 49 S.Ct. 163, 73 L.Ed. 426 (1929), the plaintiffs, alleging in their complaint a violation of the Act, sought to enjoin the withdrawal of 8,500 cubic feet of water per second from Lake Michigan. The defendants, having received a permit from the Secretary of War authorizing the withdrawal, raised the Act as a defense. Significantly, the Court, not pausing to question whether plaintiffs had the right to invoke the protection of the Act, only stated that the facts pleaded by plaintiffs constituted a cause of action. *Id.* at 409, 49 S.Ct. 163. The Court then proceeded directly to a review of the defendants' activity. Finding that the defendants' permit had authorized only a temporary withdrawal of water and that absent continuing authorization the withdrawal was unlawful, the Court held that the withdrawal should be enjoined. *Id.* at 417-21, 49 S.Ct. 163. This case, standing alone, might constitute adequate authority for allowing others beside the federal government to enforce the requirements of the Rivers and Harbors Act. The decision openly recognizes that others are beneficiaries of the Act's provisions.

1899 does not reflect a congressional intent either to afford a private remedy or to deny one.[9] Nor is the statutory language itself determinative. Section 12 of the Act provides for the enforcement of section 10, making a violation of section 10 a misdemeanor punishable by either a fine or imprisonment and authorizing a district court to enjoin the violation.[10] Section 17 of the Act, in conjunction with sec-

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[9]The intervening state water agencies contend that the legislative history does suggest an intent to foreclose private enforcement of the Act. By amendment to a bill considered prior to the 1890 statute, which later became part of 1899 Act, the Senate eliminated language allowing suit by private persons and substituted language restricting enforcement to United States Attorneys. S.27, 50th Cong., 1st Sess., 19 Cong.Rec. 2338 (1887). A close reading of the amendment, however, discloses that the Senate was addressing the question whether a private party could enforce the penal provisions of the legislation. It is generally agreed that such *qui tam* actions are not permitted. *See, e.g., Jacklovich v. Interlake, Inc.*, 458 F.2d 923 (7th Cir. 1972); *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81 (2d Cir. 1972). The amendment does not indicate a legislative intent to preclude other private actions under the 1899 Act.

[10]Section 12 provides:

> Every person and every corporation that shall violate any of the provisions of sections 401, 403, and 404 of this title or any rule or regulation made by the Secretary of the Army in pursuance of the provisions of section 404 of this title shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

33 U.S.C. § 406 (1970). Although this section expressly mentions enjoining only the erection of "structures" in violation of section 10, it is now settled that a District Court may enjoin any obstruction that violates section 10. *United States v. Republic Steel Corp.*, 362 U.S. 482, 491-92, 80 S.Ct. 884, 4 L.Ed.2d 903 (1960).

tion 12, places the duty of enforcement upon the Attorney General and the Department of Justice.[11]

Normally, these express statutory provisions would imply that no other means of enforcement are intended, with only clear contrary evidence of a legislative intent to rebut this presumption. *See Securities Investor Corp. v. Barbour, supra,* 421 U.S. at 419, 95 S.Ct. 1733, *National Railroad Passenger Corp. v. National Association of Railroad Passengers, supra,* 414 U.S. at 458, 94 S.Ct. 690. This principle, however, does not apply to the Rivers and Harbors Act of 1899. The Supreme Court has consistently construed

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[11]Section 17 provides:

> The Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of sections 401, 403, 404, 406, 407, 408, 409, 411, 549, 686, and 687 of this title; and it shall be the duty of United States attorneys to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of the Army or by any of the officials hereinafter designated, and it shall furthermore be the duty of said United States attorneys to report to the Attorney General of the United States the action taken by him against offenders so reported, and a transcript of such reports shall be transmitted to the Secretary of the Army by the Attorney General; and for the better enforcement of the said provisions and to facilitate the detection and bringing to punishment of such offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of the Army, and the United States collectors of customs and other revenue officers shall have power and authority to swear out process, and to arrest and take into custody, with or without process, any person or persons who may commit any of the acts or offenses prohibited by the said sections, or who may violate any of the provisions of the same: *Provided,* That no person shall be arrested without process for any offense not committed in the presence of some one of the aforesaid officials: *And provided further,* That whenever any arrest is made under such sections, the person so arrested shall be brought forthwith before a commissioner, judge, or court of the United States for examination of the offenses alleged against him; and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States.

33 U.S.C. § 413 (1970).

the Act's language in a manner apparently aimed toward effectuating the underlying statutory policies. *See, e.g., Wyandotte Transp. Co. v. United States, supra,* 389 U.S. at 201, 88 S.Ct. 379; *United States v. Republic Steel Corp.*, 362 U.S. 482, 80 S.Ct. 884, 4 L.Ed.2d 903 (1960). The Court has already determined that the penal provisions of the Act do not preclude implication of a civil action. *Cort v. Ash, supra,* 422 U.S. at 79, 95 S.Ct. 2080. *Wyandotte Transp. Co. v. United States, supra,* 389 U.S. at 201-202, 88 S.Ct. 379. Accordingly, we believe that the Attorney General's enforcement responsibilities were not meant to foreclose the implication that private actions are authorized to promote the purposes of section 10.[12] Rather,

> [w]e read the 1899 Act charitably in light of the purpose to be served. The philosophy of the statement of Mr. Justice Holmes . . . that "A river is more than an amenity, it is a treasure," forbids a narrow cramped reading either of § 13 or of § 10.

Republic Steel Corp., supra, 362 U.S. at 491, 80 S.Ct. at 890.

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[12]Examining a similar statutory scheme, the Supreme Court held that a provision expressly providing for enforcement by the Attorney General did not preclude implication of a private remedy. In *Allen v. State Board of Elections,* 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969), the Court identified a private right of action to enforce the Voting Rights Act of 1965, 42 U.S.C. §§ 1973-1973p (1970), notwithstanding an express provision that "the Attorney General may institute . . . an action for preventive relief," *id.* § 1973(j). 393 U.S. at 554-57, 89 S.Ct. 817.

Like the Voting Rights Act of 1965, the Rivers and Harbors Act of 1899 provides that "proper proceedings . . . may be instituted under the direction of the Attorney General of the United States." 33 U.S.C. § 406 (1970). As in *Allen,* the express reference does not necessarily preclude a private right of action. Rather, we must further determine whether it would be consistent with the broad purposes of the Act to imply such a remedy.

C. *Consistency with Legislative Scheme*

Our third inquiry concerns the consistency of implying a private right of action under section 10 with the underlying purposes of the legislative scheme. We perceive a private right of action as both consistent with the purposes of the Rivers and Harbors Act and complementary to its enforcement.

Section 10 prohibits unreasonable obstructions to navigable capacity, and in those instances specifically enumerated in its second and third clauses, the statute directs the Secretary of the Army, acting upon the recommendation of the Chief of Engineers, to determine what constitutes an unreasonable obstruction. *Wisconsin v. Illinois*, 278 U.S. 367, 413, 49 S.Ct. 163, 73 L.Ed. 426 (1929). The underlying purpose of section 10 is clear. That purpose is to keep the navigable waters of the United States free from unreasonable obstructions. Private suits such as the present one promote this policy by assuring Corps review of those activities that could obstruct the navigable capacity of the Nation's waters by altering or modifying their course, condition, or capacity.[13]

The District Court reasoned that exclusive enforcement of the criminal provisions should be vested in the Attorney General but that the Attorney General had neither the time nor the resources to seek redress for all violations of the Act. 400 F.Supp. at 624-25. The court concluded that a

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[13]We do not mean to imply that the Corps should consider only navigational interests when issuing a permit. Since the passage of the 1899 Act, Congress has enacted additional legislation directing federal officials to consider ecological and environmental effects in addition to navigation when discharging their duty. *See, e.g.*, Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666c (1976); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (1970 & Supp. V 1975). *See generally Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910, 91 S.Ct. 873, 27 L.Ed.2d 808 (1971).

private right of action was necessary to protect private parties who suffer special injuries because of these violations. *Id.* at 625. We agree,[14] but we do not rest this conclusion solely upon recognition of the Attorney General's lack of resources. An additional problem, exemplified by this case, is that the federal government, which is specifically directed to enforce the Act, may itself be charged with violating its provisions.[15] Unless private rights of action are permitted, federal violations could operate so as to wholly frustrate the purposes of the Act. *See Illinois ex rel. Scott v. Hoffman,* 425 F.Supp. 71, 75-76 (S.D.Ill.1977); *cf. Miller v. Mallery,* 410 F.Supp. 1283, 1289 (D.Or.1976).

Unlike the possible result faced by the Supreme Court in *Securities Investor Protection Corp. v. Barbour, supra,* 421 U.S. 412, 95 S.Ct. 1733, 44 L.Ed.2d 263, and *National Railroad Passenger Corp. v. National Association of Railroad Passengers, supra,* 414 U.S. 453, 94 S.Ct. 690, 38 L.Ed.2d 646, implication of a private remedy under section 10 does not raise the spectre of judicial encroachment upon executive policymaking. It is not here argued that the Corps cannot issue permits for the continued operation of the Tracy and Delta Pumping Plants. The Corps can grant to the ap-

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[14]*See generally River v. Richmond Metropolitan Auth.*, 359 F.Supp. 611 (E.D.Va.), aff'd, 481 F.2d 1280 (4th Cir. 1973).

[15]In this respect, the federal appellants base one of their arguments against upholding a private right of action on the contention that to allow such an action would amount to finding an implied waiver of sovereign immunity. We, however, have the obligation to ensure federal compliance with those measures enacted by Congress to protect the environment. To the extent that the involved federal officials have exceeded their statutory authority or have exercised that authority in an illegal manner, this suit falls within one of the well recognized exceptions to sovereign immunity. *City of Santa Clara v. Andrus,* 572 F.2d 660, 679 (9th Cir.), *cert. denied,* 439 U.S. 859, 99 S.Ct. 177, 58 L.Ed.2d 167 (1978); *Association of Northwest Steelheaders v. United States Army Corps of Eng'rs,* 485 F.2d 67, 69 (9th Cir. 1973); *Washington v. Udall,* 417 F.2d 1310, 1314 (9th Cir. 1969).

propriate federal and state officers permission to continue their pumping operations. If permits are properly obtained, the right of the appellees to enforce section 10 will not then extend so as to entitle them to obtain redress for their injury. It remains true that the Congress and the Corps ultimately decide which activities affecting navigable waters are permissible.[16]

D. *State Law*

Finally, we hold that this case is not the type of action traditionally relegated to state law. The appellants focus on allegations of the possible adverse effects upon fish and wildlife, contending that these are basically state concerns to be remedied under the law of nuisance. This approach is much too narrow. Activities affecting the navigable ca-

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[16]This result distinguishes *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 95 S.Ct. 1733, 44 L.Ed.2d 263 (1975) and *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974), two Supreme Court cases in which no private rights of action were found to exist. In both of those cases, the plaintiffs sought to challenge decisions made by corporate entities created by Congress to solve public problems. Had the Court recognized a private right of action, the subsequent litigation would have undercut the decisions of the corporations, thus upsetting the legislative scheme devised by Congress. *Securities Investor Protection Corp. v. Barbour*, *supra*, 421 U.S. at 422-23, 95 S.Ct. 1733; *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, *supra* 414 U.S. at 463, 94 S.Ct. 690. Additionally, in both instances, the legislation and its relevant history indicated an attempt to preclude private rights of action. *Securities Investor Protection Corp. v. Barbour*, *supra* 421 U.S. at 420 n. 3, 421, 95 S.Ct. 1733; *National R.R. Passengers Corp. v. National Ass'n of R.R. Passengers*, *supra*, 414 U.S. at 457-61, 94 S.Ct. 690. Thus, no private right of action was found to exist.

Here, the private right of action asserted by the appellees is not aimed at the decisions of the agency enforcing the Act. They are not challenging the issuance of permits, nor are they attempting to require the United States to prosecute a party for violation of the Act. Rather than attempting to disrupt the legislative scheme, the appellees are seeking to enforce that scheme.

pacity of navigable waters of the United States are matters of federal, not state, law. *Wyandotte Transportation Co. v. United States, supra,* 389 U.S. at 201, 88 S.Ct. 379. We agree with the District Court that

> [t]here is a federal interest in protecting persons from injuries resulting from unauthorized obstructions to the navigable capacity of navigable waters of the United States and possible federal intrusion into the area of state nuisance law is necessary so that the federal interest asserted here will not be compromised by contrary state law.

400 F.Supp. at 625.

We emphasize, even though such emphasis should be unnecessary, that our decision does not permit private parties to enforce the criminal provisions of the Rivers and Harbors Act. The Act does not authorize *qui tam* actions[17] to enforce its criminal penalties. Section 17 of the Act, 33 U.S.C. § 413 (1970), vests exclusive enforcement of its penal provisions in the Department of Justice. *Jacklovich v. Interlake, Inc.*, 458 F.2d 923 (7th Cir. 1972); *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81 (2d Cir. 1972); *Durning v. ITT Rayonier, Inc.*, 325 F.Supp. 446 (W.D. Wash. 1970). Nor do we intend to hold that private parties may sue on behalf of the general public or seek to enjoin violations of section 13 of the Act, 33 U.S.C. § 407 (1970). These questions are not before us, but there is good and sufficient reason to express our thought that this responsibility is also committed exclusively to the Department of Justice. *See Connecticut Action Now, supra* at 88-

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[17]A *qui tam* action is a civil proceeding in which an informer sues for the Government as well as for himself, to recover a penalty under a particular statute. Statutory authority for the action must be specifically provided. *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81, 84 (2d Cir. 1972).

89; *Guthrie v. Alabama By-Products Co.*, 328 F.Supp. 1140, 1144-48 (N.D.Ala. 1971), *aff'd*, 456 F.2d 1294 (5th Cir. 1972), *cert. denied*, 410 U.S. 946, 93 S.Ct. 1352, 35 L.Ed.2d 613 (1973); *Bass Angler Sportsman Society v. United States Steel Corp.*, 324 F.Supp. 412, 416 (N.D., M.D., S.D.Ala. 1971), *aff'd*, 447 F.2d 1304 (5th Cir. 1971) (per curiam).

Accordingly, we hold that private parties who suffer special injuries because of unauthorized activities affecting the navigable capacity of our Nation's waters may sue to enforce the permit requirements of section 10. There are no indicia of legislative intent to exclude a private right of action, and without this remedy, users of the Delta and the San Francisco Bay would be unable to obtain Corps review of the activities that are causing them injury.

III. STANDING

The intervening state water agencies contend that the appellees lacked standing to bring their action. Under the Supreme Court cases of *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976), and *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), as succinctly summarized by us in *Bowker v. Morton*, 541 F.2d 1347 (9th Cir. 1976), a plaintiff must allege "(a) a particularized injury (b) concretely and demonstrably resulting from defendant's action (c) which injury will be redressed by the remedy sought." *Id.* at 1349.

The individual appellees meet the standard.[18] Both have alleged a particularized injury caused by the pumping, and, although the injury may continue if the Corps eventually allows continued pumping, it may be redressed if the Corps restricts or regulates the pumping operation. Unlike the plaintiffs in *Simon v. Eastern Kentucky Welfare Rights Organization, supra,* 426 U.S. 26, 96 S.Ct. 1917, who sued the Secretary of the Treasury to contest a revenue ruling favorable to nonprofit hospitals offering only emergency room services to indigents, the individual plaintiffs' injury "can be traced to the challenged action of the defendant,

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[18]The District Court found:

> Plaintiffs in this case are The Sierra Club, Friends of the Earth, Hank Schramm, and William Dixon. The Sierra Club is a nonprofit California corporation having in excess of 130,000 members of whom more than 40,000 live in San Francisco Bay and the Sacramento-San Joaquin Delta areas. Included in the membership of the Sierra Club are many persons who use the waters referred to in the complaint for recreational purposes, including, but not limited to, boating, fishing and swimming. The stated purposes of the Sierra Club included the preservation and conservation of the natural resources, fish, and wildlife of the United States, including its rivers, bays, wetlands, deltas, and estuarine areas.
>
> Friends of the Earth is a nonprofit New York corporation which has its principal place of business in San Francisco. Its stated purposes include the preservation, restoration, and rational use of the environment.
>
> Hank Schramm is and has been engaged for the past 20 years in the business of commercial fishing and the operation of sports fishing and party boats in the San Francisco Bay and the Pacific Ocean. Schramm has an economic interest in this controversy since he depends for his livelihood on the maintenance, preservation, and conservation of sports and commercial fisheries in the San Francisco Bay and the adjoining waters of the Pacific Ocean.
>
> William Dixon owns substantial property in the Delta, including a partnership interest in the St. Germain Duck Club on Simmons Island, and consequently has an economic interest in the maintenance, preservation, and conservation of adequate non-polluted supplies of water in the Delta and San Francisco Bay regions.

400 F.Supp. at 619.

and [is] not injury that results from the independent action of some third party not before the Court." *Simon, supra* at 41-42, 96 S.Ct. at 1926.[19]

The intervenors further contend that the appellees did not meet the second standing requirement, a nonconstitutional requirement, that "the interest sought to be protected by the complainant [is] arguably within the zone of interest to be protected or regulated by the statute in question." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970); *Simon v. Eastern Kentucky Welfare Rights Organization, supra*, 426 U.S. at 39, n.19, 96 S.Ct. 1917. The intervenors' argument is founded upon their belief that the zone of interest to be protected encompasses only navigational pursuits, a tenet that is incorrect. Under section 10 the Corps must consider not only the effect of an activity upon navigation, but also its impact upon the environment. *United States v. Joseph G. Moretti, Inc.*, 526 F.2d 1306, 1310 (5th Cir. 1976), *Zabel v. Tabb*, 430 F.2d 199, 213-14 (5th Cir. 1970), *cert. denied*, 401 U.S. 910, 91 S.Ct. 873, 27 L.Ed.2d 808 (1971). We therefore hold that the appellees' interest in the environmental quality of the Delta and San Francisco Bay is within the zone of interests protected under the Rivers and Harbors Act. *See Alameda Con-*

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[19]The intervenors argue that no evidence of injury to these plaintiffs was adduced at trial, and, thus, that the appellees were without standing. Under the pretrial order, however, the District Court has deferred taking evidence relating to the environmental effect of the pumping upon the Delta and the San Francisco Bay until the second phase of the trial, which has not yet occurred. Certainly, the intervenors do not dispute that there is evidence that the pumping has caused net flow reversals and lowered water levels in the Delta. The appellees have sufficiently alleged a demonstrable, particularized injury that may result from the pumping activities, and they will have the opportunity to prove their injury in the second portion of the bifurcated trial.

servation Association v. California, 437 F.2d 1087, 1091 (9th Cir.), *cert. denied*, 402 U.S. 908, 91 S.Ct. 1380, 28 L.Ed.2d 649 (1971) (standing for private party alleging injury to fish).

Because the individual appellees possess the requisite standing to maintain this suit, it would ordinarily be needless for us to consider whether the environmental associations also have standing. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263-64 & n.9, 97 S.Ct. 555, 50 L.Ed2d 450 (1977). Since the second portion of the bifurcated trial has not yet occurred, however, we think it desirable to offer some procedural guidelines to the District Court. We shall address the issue briefly. An organization's abstract concern with a subject is insufficient to confer the requisite standing, *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), but when the organization fails to allege an injury to itself as an organization, it can establish standing by showing that it represents individual members who have themselves suffered injury and who thus could have properly sued in their own right. *Simon v. Eastern Kentucky Welfare Rights Organization, supra*, 426 U.S. at 40, 96 S.Ct. 1917; *Warth v. Seldin, supra*, 422 U.S. at 511, 95 S.Ct. 2197. The Sierra Club has satisfied the test by alleging injuries to members who use the San Francisco Bay for boating and recreational purposes. Friends of the Earth, on the other hand, has not met the requirement. It has alleged nothing more than a general organizational interest in preservation of the environment.[20] Thus, it has no standing to invoke judicial resolution of the controversy. The judgment of the District Court is vacated as to Friends of the Earth, and upon remand

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[20] *See* note 18, *supra*.

the District Court will dismiss the complaint as to Friends of the Earth.

IV. SECTION 10 OF THE RIVERS AND HARBORS ACT OF 1899

We now turn to the merits. First, the appellants attack the trial court's decision on the scope of section 10 of the Rivers and Harbors Act of 1899.[21]

The statute contains three distinct proscriptive clauses. The first clause flatly prohibits the creation of any obstruction to "the navigable capacity of any of the waters of the United States" unless affirmatively authorized by Congress. The second and third clauses, on the other hand, permit certain activities in navigable waters provided that they proceed on plans "recommended by the Chief of Engineers and authorized by the Secretary of the Army." These activities include the building of structures in navigable waters and the alteration or modification "in any manner" of the condition, capacity, or channel of any navigable water.

The District Court held that

> the operation of the Tracy and Delta Plants obstructs the navigable capacity of various waters in the Delta, and because these obstructions are the result of modification or alteration of the condition or capacity of the channel of navigable water, they are governed by the third clause of Section 10.

400 F.Supp. at 638. In so ruling, the court accepted the convincing factual evidence that export pumping by the Tracy and Delta facilities had lowered the level of navigable waters in the Delta by as much as 1.5 feet in at least one

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[21] *See* note 4, *supra*.

place and had caused net flow reversals in certain channels.[22] The District Court apparently believed that the controlling issue was whether a given diversion constituted an obstruction to navigable capacity.[23]

We decline to adopt the District Court's approach, believing that it would necessarily present the courts with difficult definitional problems in a variety of factual contexts. Instead, we interpret clauses 2 and 3 of section 10 as constituting a legislative enumeration of specific obstructions to navigable capacity that require Corps authorization.

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[22]In their opening brief the state appellants assert that the trial court entertained "the mistaken belief" that water levels on the San Joaquin River would be lowered by 1.5 feet at low tide, a fact which was disputed by the testimony of a civil engineer with the California State Department of Water Resources. Brief for Appellants Norman Livermore and John Teerink [hereinafter cited as State Opening Brief] at 13. The District Court opinion, however, explicitly notes the difference of opinion as to the amount of diversionary impact on San Joaquin River levels. 400 F.Supp. at 630 n.27. The court clearly rested its finding of obstruction to navigable capacity on separate evidence that the water level would recede at least 1 to 1.5 feet in the vicinity of Clifton Court Ferry and that operation of the pumping plants was causing net flow reversals on the San Joaquin River and the Old and Middle Rivers. *Id.* at 631-32.

[23]The court defined "navigable capacity" as "the capacity for navigation over any part of the waters in question when in their normal condition," and defined "obstruction to navigable capacity" as "to interfere with or diminish the navigable capacity of the waterway in question." 400 F.Supp. at 630 n.23 (*citing United States v. Rio Grande Dam & Irrigation Co*, 174 U.S. 690, 709, 19 S.Ct. 770, 43 L.Ed. 1136 (1899), and *Hubbard v. Fort*, 188 F. 987, 996 (C.C.D.N.J.1911)). The court observed that in *Rio Grande* the Supreme Court had stated that not every appropriation of the upper waters of a navigable stream would constitute an "obstruction" to navigable capacity: "The question always is one of fact, whether such appropriation *substantially* interferes with the navigable capacity within the limits where navigation is a recognized fact." *Rio Grande, supra*, 174 U.S. at 709, 19 S.Ct. at 777 *cited at* 400 F.Supp. at 630 n.24 (emphasis added). The question thus becomes whether in a given case a proved effect on navigable waters is substantial enough to constitute an obstruction to navigable capacity. The difficulty with this approach is that it emphasizes too strongly the question whether an "obstruction to navigable capacity" has occurred at the expense of the different question whether there has been any alteration or modification of the condition or capacity of navigable waters.

In other words, the building activities mentioned in clauses 2 and 3 are *presumed* to be obstructions to navigable capacity. Under the statute the Secretary of the Army determines whether these obstructions are reasonable. Thus, the facts in this case should be analyzed from the standpoint of whether there has been any modification or alteration of the condition or capacity of a navigable stream, rather than first determining whether there has been an obstruction to navigable capacity. [24]When one undertakes any of the activities described in clause 2 or by his activities brings about any of the results specified in clause 3, he violates section 10 if he has not first sought and obtained a permit from the Corps of Engineers.

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[24]The intervening appellants insist on the narrowest possible definition of navigable capacity. They argue that, in order to show the existence of an obstruction to navigable capacity, plaintiffs must prove, "among other things," the types of vessels that utilize a particular channel, the natural capacity of that channel to accommodate such navigation, the "navigational pursuits" of these types of vessels, and the degree to which changes in the condition or capacity of the channel may interfere with such pursuits. Brief for Intervenors and Appellants Kern County Water Agency, et al. [hereinafter cited as Intervenors' Brief] at 37-38. We fail to see any meaningful distinction between this definition of obstruction to "navigable capacity" and a showing of some effect on "actual navigation." Moreover, this argument of the intervenors is based on a fundamentally fallacious interpretation of section 10 and its three clauses, the premise of which is that under section 10 of the Rivers and Harbors Act of 1899,

> [n]ot all construction or work of the type described in Clauses 2 and 3 require approval of the Secretary of the Army. Section 10 approval is not required unless the structure or work would create some kind of obstruction, and then the Secretary is called on to determine the obstruction's reasonableness.

Id. at 35. This interpretation, which introduces the requirement of a procedural determination of substantial obstruction to navigable capacity prior to submission to the Corps for approval, leaves unaddressed the obvious problem of who is responsible for actually making the interpretation. As we see it, our acceptance of this construction of section 10 would stand the statute on its head.

In *Sanitary District v. United States*, 266 U.S. 405, 45 S.Ct. 176, 69 L.Ed. 352 (1925), the Supreme Court, construing the Rivers and Harbors Act of 1899, held that the diversion of water from Lake Michigan by the Sanitary District of Chicago fell within the scope of section 10 and was therefore beyond the power of a state in the absence of specific authorization by the Corps of Engineers. The Court referred to the fact that the Secretary of War had reviewed the Chicago Drainage Channel diversions in 1913, "including the obvious fact that so large a withdrawal would lower the levels of the Lakes and the overwhelming evidence that it would affect navigation." *Id.* at 430, 45 S.Ct. at 180. Nevertheless, Mr. Justice Holmes, for the Court, made no specific findings or determinations as to the effect on the actual navigable capacity of the lakes and rivers affected. The Court wrote:

> Evidence is sufficient, if evidence is necessary, to show that a withdrawal of water on the scale directed by the statute of Illinois threatens and will affect the level of the Lakes, and that is a matter which cannot be done without the consent of the United States, even were there no international covenant in the case.
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> * * *
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> It is a broad expression of policy in unmistakable terms, advancing upon an earlier Act of September 19, 1890, . . . which forbade obstruction to navigable capacity "not affirmatively authorized by law". . . . There is neither reason nor opportunity for a construction that would not cover the present case. As now applied it concerns a change in the condition of the Lakes and the Chicago River, admitted to be navigable, and, if that be necessary, an obstruction to their navigable capacity, . . . without regard to remote questions of

> policy. It is applied prospectively to the water henceforth to be withdrawn. This withdrawal is prohibited by Congress, except so far as it may be authorized by the Secretary of War.

266 U.S. at 426, 429, 45 S.Ct. at 179-180.

Four years later, in *Wisconsin v. Illinois, supra,* 278 U.S. 367, 49 S.Ct. 163, 73 L.Ed. 426, the Supreme Court again dealt with massive diversions by the Sanitary District of Chicago, which had lowered, by "not less than six inches," the levels of Lakes Michigan, Huron, Erie, and Ontario, their connecting waterways, and the St. Lawrence River above tidewater. Id. at 400, 49 S.Ct. 163. Chief Justice Taft wrote:

> [T]he broad words of the first clause of . . . [section 10] were not intended to limit the second and third clauses and . . . *Congress' purpose was a direct prohibition of what was forbidden by them except when affirmatively approved by the Chief of Engineers and the Secretary of War. . . .*
>
> The true intent of the Act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited, and *in the cases described in the second and third clauses of Section 10,* the Secretary of War, acting on the recommendation of the Chief of Engineers, was authorized to determine *what in the particular cases constituted an unreasonable obstruction.*

278 U.S. at 413, 49 S.Ct. at 170 (emphasis added). In short, the Corps must authorize any of the structures or activities enumerated in clauses 2 and 3, which are *presumed* to constitute obstructions. The need for applying to the Corps for a permit does not depend on some prior determination that there has been an obstruction to navigable capacity.

Even more explicit is the opinion of the Supreme Court in *United States v. Republic Steel Corp., supra,* 362 U.S. 482, 80 S.Ct. 884. There, the Court held that the unauthorized deposit of industrial solids in the Calumet River, which reduced its depth by four to nine feet in some places, constituted an obstruction to navigable capacity and thus a violation of section 10. The Court carefully distinguished between the three clauses of the section:

> The reach of § 10 seems plain. Certain types of structures, enumerated in the second clause, may not be erected "in" any navigable river without approval by the Secretary of the Army. Nor may excavations or fills, described in the third clause, that alter or modify "the course, location, condition, or capacity of" a navigable river be made unless "the work" has been approved by the Secretary of the Army. There is, apart from these particularized invasions of navigable rivers, which the Secretary of the Army may approve, the generalized first clause which prohibits "the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity" of such rivers. *We can only conclude that Congress planned to ban any type of "obstruction," not merely those specifically made subject to approval by the Secretary of the Army. It seems, moreover, that the first clause being specifically aimed at "navigable capacity" serves an end that may at times be broader than those served by the other clauses. Some structures mentioned in the second clause may only deter movements in commerce, falling short of adversely affecting navigable capacity. And navigable capacity of a waterway may conceivably be affected by means other than the excavations and fills mentioned in the third clause.* We would need to strain hard to conclude that the only obstructions banned by

> §10 are those enumerated in the second and third clauses. *In short, the first clause is aimed at protecting "navigable capacity," though it is adversely affected in ways other than those specified in the other clauses.*

362 U.S. at 486-87, 80 S.Ct. at 887-888 (emphasis added). Clearly, the structures and activities set forth in the second and third clauses need not be shown to obstruct navigable capacity before federal authorization is required by the terms of the statute.

Finally, recent Fifth Circuit authority has established beyond cavil that an alteration or modification of navigable waters is sufficient to trigger the permit requirement of section 10 of the Rivers and Harbors Act. In *United States v. Joseph G. Moretti, Inc.* (*Moretti I*), 478 F.2d 418, 429 n.37 (5th Cir. 1973), the Fifth Circuit held that "any filling of navigable waters creates an obstruction to navigation." When the same party came before the Fifth Circuit again, the court held that to trigger the permit requirements of the third clause of section 10, a party need only prove

> factual circumstances showing some effect upon navigable waters, some alteration or modification of either course, location, condition or capacity of those waters. These statutory terms are broad and undefined. So long as activities fall within this generous scope, those activities are subject to the jurisdiction of the Corps.

United States v. Joseph G. Moretti, Inc. (*Moretti II*), 526 F.2d 1306, 1309 (5th Cir. 1976);[25] *accord, Weiszmann v. District Engineer, United States Army Corps of Engineers,*

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[25]Apparently, under *Moretti II* a persuasive showing of "damaging ecological effects upon navigable waters" suffices to establish an alteration or modification in the condition and capacity of waters violating section 10, clause 3. *Id.* at 1310. Because of our conclusion and the specific issues that are before us, we express no opinion as to the extent to which ecological considerations may trigger the need for a permit under section 10.

526 F.2d 1302, 1305 (5th Cir. 1976); *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1296-99 (5th Cir. 1976).

The state appellants and intervenors, however, present another argument in support of their interpretation of section 10. They argue that Congress has left to the states the regulation of water rights including direct water supply diversions, and that

> [t]o a large extent Congress has chosen to subordinate navigation uses to those diversions. Consequently application of Section 10 of the 1899 Act to State authorized water supply diversions requires a substantially greater demonstration of tangible interference with navigable capacity, than does application of Section 10 to structures, fills, or sewage dilution diversion activities that do not relate to public water supply.

Intervenors' Brief, *supra* note 24, at 46. *See also* State Opening Brief, *supra* note 22, at 14-20. To support their argument, those parties cite various congressional enactments, primarily in the area of reclamation, which contain generalized statements announcing a congressional policy of federal noninterference in state water laws and rights.[26]

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[26]In the appendix to their brief, the intervenors set our excerpts from 37 statutes containing references to congressional recognition of state water rights, particularly in the area of state-authorized water diversions for irrigation or consumption purposes. Typical of these statements is one found in section 8 of the Reclamation Act of June 17, 1902, 43 U.S.C. § 383 (1970), which provides that nothing in that Act

> shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing in such sections shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

Other representative statutes cited by the intervenors include the Flood Control Act of 1944, 33 U.S.C. § 701-1(b) (1970); the Water Supply Act of 1958, 43 U.S.C. § 390b(a) (1970); and the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251(b), 1370 (Supp. V 1975).

The case authority interpreting the reclamation statutes makes it clear to us that a principal purpose of such reference to state law "is to leave to state law the *definition* of the property interests, if any, for which *compensation* must be made" when these state or private rights and interests are acquired by eminent domain. *City of Fresno v. California*, 372 U.S. 627, 629-30, 83 S.Ct. 996, 998, 10 L.Ed.2d 28 (1963) (emphasis added). The Supreme Court, analyzing the effect on the California Central Valley Project of broad language recognizing state water rights in section 8 of the Reclamation Act of 1902,[27] explained:

> [I]t merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. As the Court said in [*State of*] *Nebraska v.* [*State of*] *Wyoming*, *supra* [325 U.S. 589, 615, 65 S.Ct. 1332, 89 L.Ed. 1815 (1945)]: "We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system."

Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 291, 78 S.Ct. 1174, 1183-1184, 2 L.Ed.2d 1313 (1958). Similarly, in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 70 S.Ct. 955, 94 L.Ed. 1231 (1950), the Supreme Court specifically held that section 8 of the 1902 Act reflected a congressional intent, for the purposes of the Act, not to take water rights without compensation under the navigational servitude. *Id.* at 737-39, 70 S.Ct. 955.

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[27] 43 U.S.C. §383 (1970), *quoted at* note 26 *supra*.

As the Court has recently indicated, just last Term, the general restriction on federal action embodied in section 10 is that the Secretary of the Interior must "appropriate, purchase, or condemn necessary water rights in strict conformity with state law." *California v. United States*, 438 U.S. 645, 665, 98 S.Ct. 2985, 2996, 57 L.Ed.2d 1018 (1978). In that case, the Court, correcting some confusion concerning the scope of section 8 engendered by its prior opinions, ruled that the recognition of state law mandated by section 8 is not limited to situations in which the United States acquires water rights:

> Section 8 cannot be read to require the Secretary to comply with state law only when it becomes necessary to purchaser or condemn vested water rights. That section does, of course, provide for the protection of vested water rights, but it also requires the Secretary to comply with state law in the "control, appropriation, use, or distribution of water."

438 U.S. at 674-75, 98 S.Ct. at 3001. Therefore, the State of California was permitted to impose any conditions on the United States Bureau of Reclamation's appropriation of water from the Central Valley Project that did not conflict with clear congressional directives authorizing the project. Mr. Justice Rehnquist, writing for the majority, emphasized that state water law governs federal operation of reclamation projects only to the extent that Congress has chosen not to legislate otherwise. The Court reaffirmed the validity of the basic holdings of *Ivanhoe, supra*, 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313, and *Fresno, Supra*, 372 U.S. 627, 83 S.Ct. 996, 10 L.Ed.2d 28, i.e., that specific congressional directives concerning reclamation override state law to the extent that there is a conflict between the two bodies of authority. 438 U.S. at 670-72, 98 S.Ct. at 2999; *see id.* at 670 n.23, 671 n.24, 98 S.Ct. 2985.

Section 8 of the 1902 Reclamation Act and the other statutory provisions for federal deference to state water rights do not lend support to the novel suggestion made by the appellants despite the new vitality, given those provisions by *California v. United States*. The congressional policy of compliance with state law for the appropriation, purchase, condemnation, and distribution of water rights, in the absence of express congressional provision to the contrary, cannot be lifted from the context of *reclamation* so as to enroach upon the express provisions of the Rivers and Harbors Act, a statute directly concerned with obstructions to and modifications of navigable waters, enacted under the congressional power over commerce and *navigation* *Cf. Gerlach, supra*, 339 U.S. at 731-42, 70 S.Ct. 955.

The Rivers and Harbors Act, of course, does not itself mention noninterference with state-authorized water supply diversion operations. The appellants point to no authority supporting their interpretation of section 10, under which the Act assertedly is to be applied differently in situations in which a state has authorized water diversions. In *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 19 S.Ct. 770, 43 L.Ed. 1136 (1899), a case upon which the appellants attach some reliance, the Supreme Court clearly recognized that the federal authority over navigable waters delegated by Congress to the Corps under the Rivers and Harbors Act of 1890, the predecessor of the 1899 Act, overrides any state power to authorize a water diversion project that would adversely affect navigation. The power of states over waters within their dominions, the Court held

> is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the General Government over interstate commerce and its natural high-

> ways vests in that Government the right to take all needed measures to preserve the navigability of the navigable water courses of the country even against any state action.

174 U.S. at 703, 19 S.Ct. at 775. The Court observed that prior to 1890 Congress, through legislation, "recognized and assented to the appropriation of water" by states and private entities organized under state law, but ruled that the Rivers and Harbors Act controlled the issue insofar as any conflict existed. Referring to the 1890 Act, the Court wrote:

> [I]t is obvious that Congress meant that thereafter no State should interfere with the navigability of a stream without the condition of national assent. It did not, of course, disturb any of the provisions of prior statutes in respect to the mere appropriation of water of *non-navigable* streams in disregard of the old common-law rule of continuous flow, and its only purpose, as is obvious, was to affirm that as to *navigable waters nothing should be done to obstruct their navigability without the assent of the National Government*. It was an exercise by Congress of the power, oftentimes declared by this court to belong to it, of national control over navigable streams. . . . *The language is general, and must be given full scope*. It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and *anything, wherever done or however done*, within the limits of the jurisdiction of the United States *which tends to destroy the navigable capacity* of one of the navigable waters of the United States, is within the terms of the prohibition. 174 U.S. at 708, 19 S.Ct. at 777 (emphasis added).

In *Sanitary District v. United States, supra*, 266 U.S. 405, 45 S.Ct. 176, 69 L.Ed. 352, the Supreme Court specifically dealt with state diversions of water for public health

purposes, describing as plenary the power of Congress to remove what it identifies as obstructions to interstate and foreign commerce.

> This is not a controversy between equals. The United States is asserting its sovereign power to regulate commerce and to control the navigable waters within its jurisdiction.
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> * * *
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> The main ground is the authority of the United States to remove obstructions to interstate and foreign commerce. *There is no question that this power is superior to that of the States to provide for the Welfare or necessities of their inhabitants*. In matters where the States may act the action of Congress overrides what they have done. . . . But in matters where the national importance is imminent and direct even where Congress has been silent the States may not act at all.

266 U.S. at 425-26. 45 S.Ct. at 178-179 (emphasis added).

While states undeniably possess broad power to regulate their own navigable waters for the general welfare, the power clearly is, and should be subordinate to the federal navigational power unless Congress expressly defers to the state authority in the context of a specific statute. Since Congress did not so defer to state authority in the case of the Rivers and Harbors Act of 1899, the State of California's powers over navigable waters cannot narrow the authority

of the Corps over navigable waters as applied to state water diversions[28]

In sum, we hold that the lowering of water levels, as established in this case, amounts to an alteration or modification of the condition or capacity of Delta waters under clause 3 of section 10, and thus requires authorization by the Corps. This result follows without regard to the effect of the pumping plants on actual navigable capacity because a prior finding of obstruction to navigable capacity is not necessary in order to trigger the effect of clauses 2 and 3 of section 10. The federal authority set forth in the Rivers and Harbors Act of 1899 reigns paramount. Congressional deference to traditional state regulation of water rights, a consideration of significance in other contexts, does not operate to restrict the express policy of section 10.

V. AUTHORIZATION

Having determined that the construction and operation of the Tracy and Delta Plants require the approval of the Corps under section 10, the District Court then ruled that

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[28]The Court, in *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 19 S.Ct. 770, 43 L.Ed. 1136 (1899), illustrated this proposition of overriding federal supremacy in the area of navigation with an example:

> The Hudson River runs within the limits of the State of New York. It is a navigable stream, and a part of the navigable waters of the United States, so far at least as from Albany southward. One of the streams which flows into it and contributes to the volume of its waters is the Croton River, a nonnavigable stream. Its waters are taken by the State of New York for domestic uses in the city of New York. Unquestionably the State of New York has a right to appropriate it waters, and the United States may not question such appropriation, unless thereby the navigability of the Hudson be disturbed. On the other hand, if the State of New York should, even at a place above the limits of navigability, by appropriation for any domestic purposes, diminish the volume of waters, which, flowing into the Hudson, make it a navigable stream, to such an extent as to destroy its navigability, undoubtedly the jurisdiction of the National Government would arise and its power to restrain such appropriation be unquestioned. . . .

174 U.S. at 709, 19 S.Ct. at 777.

both facilities lacked the required authorization. The respective appellants offer different arguments in respect to the Tracy Pumping Plant, a federal facility, and the California's Delta Pumping Plant. The federal appellants contend that various congressional acts affirmatively authorized the Tracy Plant under section 10, clause 1. The state appellants maintain that various section 10 permits issued over the years for certain components of the Delta Plant constitute authorization for the entire Delta Plant. In addition, the state appellants urge that a Federal Power Commission license for portions of the California Water Project eliminated any need to obtain section 10 approval. Other contentions made by the appellants in the District Court are not pressed on this appeal. We first consider the question of congressional authorization of the Tracy Pumping Plant.

A. *Congressional Authorization of the Tracy Pumping Plant.*

The trial court found no congressional authorization of the Tracy Pumping Plant. It based its decision on the legal conclusion that "[t]he initial authorization to create an obstruction must rest on express and not implied Congressional authority. . . . The approval or funding of a facility does not compromise Congress's right to control its operation." 400 F.Supp. at 637 (*citing Sanitary District v. United States supra*, 266 U.S. at 428, 45 S.Ct. 176, and *Hubbard v. Fort*, 188 F. 987, 996 (C.C.D.N.J.1911)[29]

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[29]The District Court principally relied upon the following statement from *Sanitary District*:

> The act [of March 2, 1827, ch. 51, 4 Stat. 234] granted land to Illinois in aid of a canal to be opened by the State for the purpose of uniting the waters of the Illinois River with those of Lake Michigan, but if it has any bearing on the present case it certainly vested no irrevocable discretion in the State with regard to the amount of water to be withdrawn from the Lake. It said nothing on that subject. We repeat that we assume that the United States desires to see the canal maintained and therefore pass by as immaterial all evidence of its having fostered the work. *Even if it had approved the very size and shape of the channel by act of Congress it would not have compromised its right to control the*

The rationale of the District Court sweeps too broadly. In our view, congressional approval or authorization may be found in virtually any type of statute, including appropriations statutes, so long as it is demonstrated that Congress had knowledge of the precise action or project at issue and was explicitly and specifically addressing that project. *United States v. Arizona*, 295 U.S. 174, 55 S.Ct. 666, 79 L.Ed. 1371 (1935), casts light upon the principle. There, the Supreme Court held that the Parker Dam, which the United States planned to build in the Colorado River between Arizona and California, was not authorized by any congressional act, as required by the Rivers and Harbors Act of 1899. The Government, contending that Congress had approved the dam, cited a 1904 Act authorizing the diversion of Colorado River waters for the purpose of irrigating adjoining lands on Indian reservations. *Id.* at 185, 55 S.Ct. 666. In support of its construction, the Government asserted that under the 1904 Act another structure, the Laguna Dam, had previously been built across the Colorado.

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amount of water to be drawn from Lake Michigan. It seems that a less amount than now passes through the canal would suffice for the connection which the United States has wished to establish and maintain.

266 U.S. at 427-28, 45 S.Ct. at 179 (emphasis added). Applying what it perceived to be the Supreme Court rule, the District Court held:

> In the instant case none of the acts in question either contain sufficiently explicit language or are accompanied by a legislative history clearly manifesting approval of the facilities for the purpose of Section 10. *For the most part* these acts do not even refer specifically to the pumping plant but rather are very general approvals of the Central Valley Project or the San Luis unit. *All Congress did was authorize the construction of those projects and appropriate funds for them*. Congress did not, however, agree to relinquish its Section 10 responsibilities or exercise this power in any respect. *Even if Congress had gone so far as specifically to fund the construction of the Tracy Plant precisely as it stands today, this fact would not constitute authorization to operate it, as before operation occurred, either Congress or the Corps of Engineers would have to consider within what Section 10 parameters the Tracy Plant could operate and issue an appropriate authorization*.

(footnote continued on following page)

Rejecting the Government's argument, the Supreme Court pointed out that "Congress has made appropriations for the benefit of the project of which it [the Laguna Dam] is a part and so recognized and approved the building of the dam," citing Acts of 1916, 1917, and 1918 making appropriations for the Yuma Project, Arizona-California, which includes the Laguna Dam. *Id.* at 186 n.5, 55 S.Ct. 666. As to the Parker Dam, however, the Court refused to hold that Congress had authorized the project under the 1904 Act "by making appropriations for irrigation of lands in Indian reservations." *Id.* Unlike the situation in our case, the 1904 Act did not specifically address the project at issue. *Compare* Rivers and Harbors Act of 1937, ch. 832, 50 Stat. 844, 850 *quoted* at n.31 *infra* with Act of Apr. 21, 1904, § 25, 33 Stat.224.

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400 F.Supp. at 637-38 (emphasis added).

In the quoted passage from *Sanitary District* the Supreme Court strictly construed the actions of the United States as to the diversion of Lake Michigan waters. In that case the federal government had brought suit to enjoin the Sanitary District of Chicago from diverting water from the lake in excess of a specified amount. The District had defended on the basis of estoppel, arguing that "the United States has given its assent to all that has been done and . . . it is estopped to take the position" that the diversions constituted obstructions to navigable capacity. 266 U.S. at 427, 45 S.Ct at 179. It was, therefore, in the context of considering an argument of estoppel against the Government that Mr. Justice Holmes stated that the "strict construction of the Government's act" avoided the defendant's contention. Id. Accordingly, the import of *Sanitary District* is not that Congress must affirmatively authorize *both* construction and operation of a diversion project for it to be legal under section 10, as the District Court supposed. Instead, the Supreme Court simply stated that Congress is *not precluded* from setting limits on the amount of a water diversion even if it has previously authorized the specific project. An analogue in the instant case would arise if the federal government itself were actively seeking to restrict the amount of water diverted by the Tracy Plant. None contends that it could not do that, if it so chose. The right of the Congress to control the operation of a facility that it has previously approved, however, is not at issue here. In short, we cannot accept the proposition that *Sanitary District* supports the finding that section 10 requires separate approval by either Congress or the Corps for both the construction and the operation of a water diversion project.

United States v. Arizona, supra, teaches that Congress, while it may authorize a project by means of general appropriations legislation, must have known and intended that the specific facility in question was a part of the project for which it was making appropriations. This interpretation is supported by other cases holding that Congress may authorize activities by means of appropriations legislation that specifically and directly relates to the projects in question.[30] We also note that the Corps' administrative regulations governing issuance of permits are consistent with this principle:

> The general legislation by which Federal agencies are empowered to act generally is not considered to be sufficient authorization by Congress to satisfy the purposes of Section 10. If an agency asserts that it has Congressional authorization meeting the test of Section 10 or would otherwise be exempt from the provisions of Section 10, *the legislative history and/or provisions of the Act should clearly demonstrate that Congress*

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[30]*See United States v. Dickerson,* 310 U.S. 554, 60 S.Ct. 1034, 84 L.Ed. 1356 (1940) (Congress could suspend certain military re-enlistment allowances, provided for by prior legislation, by means of an amendment to an appropriations bill); *Wisconsin v. Duluth,* 96 U.S. 379, 382-88, 24 L.Ed. 668 (1878) (by means of an appropriation, Congress had "adopted, recognized, and taken charge of" a project previously initiated privately without congressional authorization); *Friends of the Earth v. Armstrong,* 485 F.2d 1,9-10 (10th Cir. 1973) (en banc) (Congress can, by an appropriations act, suspend or modify a prior act concerning the spreading of waters impounded in Lake Powell into Rainbow Bridge National Monument), *cert. denied,* 414 U.S. 1171, 94 S.Ct. 933, 39 L.Ed.2d 120 (1974); *United States v. Kennedy,* 278 F.2d 121, 122-23, 126 (9th Cir. 1960) (General Appropriation Act of 1951, Act of Sept. 6, 1950, 64 Stat. 595, appropriating funds for the National Park Service, provided necessary statutory authorization for taking of land within boundaries of Mount McKinley National Park); *cf. City of Santa Clara v. Andrus,* 572 F.2d 660, 672 (9th Cir.) *cert. denied,* 439 U.S. 859, 99 S.Ct. 177, 58 L.Ed.2d 167 (1978) (to show congressional ratification of an electrical power allocation scheme by appropriation of money, "the government must sustain the heavy burden of demonstrating Congressional knowledge of the precise course of action alleged to have been acquiesced in").

> *was approving the exact location and plans from which Congress could have considered the effect on navigable waters* of the United States or that Congress intended to exempt that agency from the requirements of Section 10.

33 C.F.R. § 322.3(c)(1) (1978) (emphasis added). Generally, a court should accord great weight to the construction of a statute by the agency responsible for its administration. *E.g., California v. United States, supra,* 438 U.S. at 676 n.30, 98 S.Ct. 2985; *Zemel v. Rusk,* 381 U.S. 1, 11, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965); *Udall v. Tallman,* 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965).

The question thus narrows itself to whether the various congressional statutes and legislative history concerning the Central Valley Project are so sufficiently specific as to the Tracy Pumping Plant as to constitute congressional authorization under section 10. In our view, the basic enactments authorizing the Central Valley Project in 1937 and the annual appropriations acts for operation and maintenance of the Central Valley Project, when read in light of the legislative history of the broad oversight exercised by the Congress over the project, constitute affirmative authorization of the Tracy Plant.

The Rivers and Harbors Act of 1937, ch. 832, § 2, 50 Stat. 844, 850, reauthorized the entire Central Valley Project, theretofore authorized and established under the Emergency Relief Appropriation Act of 1935, 49 Stat. 115.[31] As of 1937, then, Congress had clearly authorized the Central

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[31]The Rivers and Harbors Act of 1937 declared the Central Valley Project

Valley Project, the general plans of which contemplated a large-scale diversion of water from the Delta to the San Joaquin Valley. Subsequently, Congress enacted the Reclamation Project Act of 1939, ch. 418, 53 Stat. 1187 (codified at 43 U.S.C. §§ 375a, 387-389, 485-485h, 485i-485k (1970)). Section 9(a) of the Act, 43 U.S.C. § 485h(a) (1970), provides that federal reclamation projects were to become automatically authorized when the Secretary of the Interior found them to be feasible and submitted a favorable report to the President and to the Congress.[32] On February

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to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, *providing for storage and for the delivery of the stored waters thereof*, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes: *Provided further*, That, except as herein otherwise specifically provided the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals, power plants *pumping plants*, transmission lines, and identical works *deemed necessary to said entire project*, and the Secretary of the Interior may enter into repayment contracts, and other neccessary contracts, with State agencies, authorities, associations, persons, and corporations, either public or private, including all agencies with which contracts are authorized under the reclamation law. . . .

Rivers and Harbors Act of 1937, ch. 832, § 2, 50 Stat. 844, 850.

[32]Section 485h(a) reads, in pertinent part, as follows:

If the proposed construction is found by the Secretary to have engineering feasibility and if the repayable and returnable allocations to irrigation, power, and municipal water supply . . ., together with any allocation to flood control or navigation . . ., equal the total estimated cost of construction as determined by the Secretary, then the *new project, new division of a project, or supplemental works on a project, covered by his findings, shall be deemed authorized and may be undertaken by the Secretary* If all such allocations do not equal said total estimated cost, the said new project, new division, or new supplemental works may be undertaken by the Secretary only after provision therefor has been made by Act of Congress . . ..

43 U.S.C. § 485h(a) (1970) (emphasis added.)

24, 1947, the Secretary of the Interior forwarded to Congress a Finding of Feasibility pursuant to the 1939 Reclamation Act. H.R. Doc. No. 146, 80th Cong., 1st Sess. (1947), *reprinted in* Engle, *Central Valley Project Documents*, H.R. Doc. No. 416, 84th Cong., 2d Sess., pt. 1, at 574 (1956). The feasibility report contained a detailed discussion of the Delta-Mendota Canal, the 115-mile canal connecting the Mendota Pool in the San Joaquin Valley with the Tracy Pumping Plant. The initial contract for construction of the Delta-Mendota Canal was dated June 14, 1946, and the canal's construction was completed prior to July 1, 1952. The initial construction contract for the Tracy Pumping Plant was made on June 23, 1947, with construction of the Plant completed prior to February 1, 1953.

Over the years Congress has repeatedly appropriated funds for the Tracy facilities. These appropriations acts have generally lumped together funds for the Central Valley Project as a whole. As such, the situation appears to come within the dictum of *United States v. Arizona* that "Congress has made appropriations for the benefit of the project of which it is a part and so *recognized and approved* the building" of the project under the Rivers and Harbors Act of 1899. *United States v. Arizona, supra,* 295 U.S. at 186, 55 S.Ct. 666, at 670 (emphasis added).[33] It is manifest from the legislative history that Congress was well aware of the Tracy Pumping Plant as part of the Central Valley Project, fully

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[33]Moreover, the First Deficiency Appropriation Act of 1946, ch. 589, 59 Stat. 632, 647-48 (1945), contained an appropriation "for construction of the . . . Delta division, Delta-Mendota canal, $7,500,000," and the Interior Department Appropriation Act of 1949, ch. 754, 62 Stat. 1112, 1129 (1948), contained a specific appropriation for the Tracy Pumping Plant Switchyard.

approved of it, and consistently encouraged its construction and operation.[34]

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[34]The Legislative history of congressional authorization of and appropriations for the Central Valley Project is fully covered in Engle, *Central Valley Project Documents*, H.R. Doc. No. 416, 84th Cong., 1st Sess., pt. 1 (1956), and H.R.Doc.No.246, 85th Cong., 1st Sess. (1957).

A 1946 House report stated that funds were to be provided for transmission lines to bring "power to the Delta area *where it will be required for the pumping of water for* irrigation and water supply purposes. The sum recommended would provide funds to begin construction of this line, extending from Oroville to Tracy." H.R.Rep.No.1288 on H.R.4805, 79th Cong., 1st Sess. (1946), *reprinted in* Engle, *supra*, pt. 2, at 21 (emphasis added). Again, in 1947, an appropriation was made for completion of the power transmission line, "which will ultimately be extended to Tracy to provide power for pumping water in the Delta area. . . ." *Id.*, *reprinted in* Engle, *Supra*, pt. 2, at 22-23. In 1949 the following statement appears in H.R.Rep.No.2038, 80th Cong., 2d Sess. (1948), *reprinted in* Engle, *supra*, pt. 2, at 27-28:

> The drought which large areas in California have experienced this past winter reemphasizes the necessity for expediting the construction of the irrigation facilities of the Central Valley project. To this end the committee has made liberal appropriations for storage and irrigation facilities. It has also provided all funds necessary to continue construction of the powerplants and switchyards at Shasta and Keswick Dams, the Oroville-Tracy transmission line and the switchyard at the Tracy pumps on the Delta-Mendota canal. . . . None of the funds in the bill and no funds heretofore provided for switchyards are to be used for the construction . . . of any switchyard facilities at Tracy not required for the operation of the project pumps. . . .

See Act of June 29, 1948, ch. 754, 62 Stat. 1112, 1128-29. The Senate report discussing the same bill stated:

> The committee recognizes that the Central Valley project has since its inception contemplated the construction of transmission lines done [sic] the West side of the Sacramento River as well as down the East side from Shasta Dam to the Tracy pumping plant, which lines are an integral part of this multiple-purpose project.

S.Rep.No.1609, 80th Cong., 2d Sess. (1948), *reprinted in* Engle, *supra*, pt. 2, at 28. In 1952 Commissioner of Reclamation Michael W. Straus testifed at Senate hearings on the Central Valley Project appropriations bill for that year:

> I want to report particularly on the Central Valley project of California *that this committee has protected and financed* since Reclamation was given the job of making California's half-century dream come true. . . .

(footnote continued on following page)

In 1960 Congress authorized the construction of the San Luis Unit of the Central Valley Project. Act of June 3, 1960, Pub.L. No.86-488, 74 Stat. 156. In section 4 of the Act Congress expressly noted the precise location and plans of the Tracy Pumping Plant as a critical and integral part of the San Luis Unit Project.[35] There is no evidence whatsoever that Congress intended to authorize the San Luis Unit if,

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> The California Legislature has declared August 1 to August 10 a Central Valley Project Festival. The reason for these dates is that our multiple-Year, multiple-purpose job of completing the original authorized project is virtually complete. On August 1 water will be released from Shasta Dam, carried down the Sacramento River through Shasta and Keswick generators, through the cross-channel-canal cut, *lifted up 200 feet by the great Tracy pumps*, sloshed down the long Delta-Mendota Canal to the Mendota pool, where it will be exchanged for water trapped by Friant Dam in the San Joaquin River, and carried 158 miles down the Friant-Kern Canal to Bakersfield.
>
> That is an overall total movement of water 500 miles-the farthest that man has moved water anywhere at any time. *That is a culmination of the work this committee has supported over the years.*
>
> It will be a period of rejoicing the whole length of the California Valley. It is my hope that the members of this committee *who protected and nursed the project into being* can accept some of the multiple invitations I know they are going to receive to see *the attainment of the committee's objective.*

Engle, *supra*, pt. 2, at 37 (emphasis added). Further references to the Tracy Pumping Plant and specific appropriations therefor as an integral part of the Central Valley Project abound in the legislative history. *E. G., id.* at 21-28, 32-38, 40-44, 49, 50-51, 60, 65, 305.

[35]Section 4 of this Act provides, in pertinent part:

> If the Secretary proceeds to construct, operate, and maintain the San Luis Works under the terms of section 1 of this Act solely as a Federal project, the operation shall be subject to the following restriction: Whenever the chlorides in the water at the head of the Delta-Mendota Canal exceed one hundred and fifty parts per million during the months of July, August, or September, *the mean daily diversion from the Sacramento-San Joaquin Delta to San Luis unit via Tracy pumping plant and Delta-Mendota Canal* as measured at the San Luis pumping plant shall not exceed the mean daily import to the Sacramento Valley from the Trinity project.

Act of June 3, 1960, Pub.L.No.86-488, § 4, 74 Stat. 156, 159 (emphasis added).

and only if, the Corps of Engineers subsequently issued a section 10 permit on its own for either the construction or operation of the Tracy Plant. The District Court distinguished the 1960 Act on the ground that it was enacted after the commencement of the operation of the Tracy Plant, "and hence even if it were intended as Congressional consent, the original construction and operation of the Tracy Plant were unlawful." 400 F.Supp. at 637 n.41. We disagree. In *Wisconsin v. Duluth*, 96 U.S. 379, 24 L.Ed. 668 (1878), the Supreme Court upheld congressional authorization of a previously inaugurated private project on the basis of an appropriations act. The Court reasoned that it would unreasonably restrict Congress' power to hold that Congress could not retroactively approve previously unauthorized projects.

We are therefore constrained to hold that the statutes and legislative history sufficiently demonstrate congressional approval of the Tracy Pumping Plant and its operation, both at the initiation of the Central Valley Project and, retroactively, after the completion of the plant.[36]

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[36]After the first draft of a proposed Opinion in the present appeal was circulated for the consideration of Judges Trask and Tang, our court issued its decision in *Libby Rod and Gun Club v. Poteat*, 594 F.2d 742 (9th Cir. 1979). Initially, *Libby* was the cause of concern on the part of the author of this Opinion, especially in respect to our conclusion that Congress had impliedly authorized the Tracy Pumping Plant. Certain broad language in *Libby* appeared to declare that, henceforth, the affirmative congressional authorization specifically required by the Rivers and Harbors Act for obstructions to navigable capacity of waters could not be conferred by appropriations bills alone, however, specific such an appropriation act may have been toward a particular project it was funding. *See* 594 F.2d at 746, especially notes 5 and 6, and Judge Kennedy's dissenting opinion at 748-753. This concern, however, has been laid to rest by the concurring opinion of Judge Tang, who was one of the two judges constituting the majority in *Libby*. See pages 607 to 609, *infra*.

B. *Corps Authorization of the Delta Pumping Plant*

In the District Court the state appellants contended that various section 10 permits issued with respect to components of the Delta Pumping Plant constituted Corps authorization of the plant itself. Here, they limit their argument to Permit No. 4101, issued in June 1967, which authorized the construction of the Clifton Court Forebay. This forebay, a reservoir between the Delta and the pumping plant, was designed to allow the pumping to be confined to off-peak electrical hours. Its only function is to serve as an intake facility for the Delta Pumping Plant.

Plainly, the permit does not authorize the entire Delta Pumping Plant. No direct evidence in the permit file refers to the pumping plant, and the permit itself only authorized the State "to cut the westerly levee, of West Canal, at Clifton Court Tract for Clifton Court Forebay in Contra Costa County, California." Nor can we construe the permit as implicit authorization for the Delta Plant. The Corps regulations required that a permit application be complete and without reference to any unattached correspondence. 33 C.F.R. § 209.-130(b)(6) (1967). Maps and plans showing the location, extent, and character of the project were considered essential, and the proposed work was to be indicated in red ink. 33 C.F.R. §§ 209.130(c)(1), (c)(11) (1967). Given the completeness required of the application and the absence of any mention of the Delta Plant therein, we cannot appropriately say that the permit implicitly au-

thorized more than the approved application upon which it was based.[37]

The state appellants also contend that a Federal Power Commission (FPC) license for portions of the California Water Project eliminated the need for a section 10 permit. Had the FPC granted a license covering the Delta Pumping Plant, their position would have some support. *See Scenic Hudson Preservation Conference v. Callaway*, 370 F.Supp. 162, 164-68 (S.D.N.Y.1973), *aff'd*, 499 F.2d 127 (2d Cir. 1974). But the FPC did not license the Delta Pumping Plant. Instead, it expressly and specifically declined to "extend our jurisdiction beyond those facilities actually constructed

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[37]Even if it could be said that Permit No. 4101 initially authorized the operation of the Delta Pumping Plant, the Corps yet retains the power to impose conditions upon the continuing pumping operation. As the state appellants concede, paragraph (f) of Permit No. 4101 provides, in respect to the authorized activity, that "if, in the opinion of the Secretary of the Army, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required . . . to remove or alter the structural work or obstructions caused thereby. . . ." Moreover, under the Corps' present regulations,

> [t]he District Engineer may reevaluate the circumstance and conditions of a permit either on his own motion or as a result of periodic progress inspection, and *initiate action to modify, suspend or revoke a permit as may be made necessary by consideration of the general public interest*. . . . Significant increases in scope of a permitted activity will be processed as new applications for permits in accordance with section 325.2, and not as modifications under this paragraph.

33 C.F.R. 325.7(a) (1978) (emphasis added). Thus, even if no further authorization is required to justify the continued existence of the Delta Pumping Plant because of the Corps' prior acquiescence in the plant's operations, the State is not relieved from section 10 permit requirements. Although the prior acquiescence by the Corps may establish a basis for estoppel against a Corps request to abolish the Delta Pumping Plant altogether, the operations of the plant remain subject to present regulations of the Corps. *See Sanitary Dist. v. United States*, 266 U.S. 405, 427-28, 45 S.Ct. 176, 69 L.Ed. 352 (1925); *cf. United States v. Sunset Coves, Inc.*, 514 F.2d 1089, 1090 (9th Cir.), *cert. denied*, 423 U.S. 865, 96 S.Ct. 125, 46 L.Ed.2d 94 (1975). Additionally, as we understand the above quoted Corps regulations, any significant increase in the pumping must have received Corps authorization.

for power purposes so as to include hundreds of miles of canals, pumping stations and other associated facilities unrelated to the production of power." Department of Water Resources of the State of California, 51 F.P.C. 529, 533 (1974).

The Corps of Engineers has promulgated regulations to govern situations in which its jurisdiction overlaps with that of the FPC. When a project is subject to FPC regulation, the Corps fulfills its duty of protecting navigable waters by recommending to the FPC the inclusion of appropriate provisions rather than by directly issuing a Corps permit; however, "as to any other activities in navigable waters not constituting construction, operation and maintenance of physical structures licensed by the FPC . . . the provisions of 33 U.S.C. § 401 *et seq*. remain fully applicable." 33 C.F.R. § 320.-3(f) (1978).

The FPC agrees that its license does not necessarily extend to all facilities of a project. In its opinion concerning the California Water Project, the FPC cautioned that "[t]he mere fact that various facilities are proposed for licensing by an applicant is not sufficient reason to assume that all such facilities are properly the subject of a license." The FPC also said, "[W]hen a particular facility is no longer part of the power project itself, it is not subject to our licensing jurisdiction." Department of Water Resources of the State of California, 51 F.P.C. 529, 533 (1974).

Thus, both the Corps and the FPC have said that the State should apply to the Corps for a permit for construction of a water transportation facility unrelated to power production. Their construction of the interrelationship between the Federal Power Act and the Rivers and Harbors Act is entitled to much deference, and we will follow it here. *See Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 409-10, 95 S.Ct. 1066, 43 L.Ed 2d 279 (1975).

Although we reject the contentions of the state appellants as to the effect of Permit No. 4101 and the FPC license, it is conceivable that the State may still be excused from obtaining a permit for the operation of the Delta Pumping Plant. Present regulations of the Corps of Engineers contain a grandfather clause that dispenses with the need to obtain individual section 10 authorization for certain structures. The regulation provides, in pertinent part:

> The following structures or work are hereby permitted for purposes of Section 10 and do not require separate Department of the Army permits:
>
> * * * * * *
>
> (g) Structures or work completed before 18 December 1968 or in water-bodies over which the District Engineer has not asserted jurisdiction *provided* there is no interference with navigation.

33 C.F.R. § 332.4(g) (1978) (emphasis added).[38] The District Court found that

> [c]onstruction commenced on the Delta Pumping Plant . . . in July of 1963 and was sufficiently completed by late 1967 so that the Delta Plant could begin diverting Delta water at that time. It was not until February of 1969, however, that all construction was finished.

400 F.Supp. at 620-21.

Because the record on appeal does not reflect whether the pumping plant itself was completed prior to December 18, 1968, and the parties have not yet addressed the question, this question should first be considered by the District Court. At this time we express no opinion as to the validity of the Corps regulation. All such arguments should be presented in the first instance to the District Court. If the District

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[38]The superseded regulation, 33 C.F.R. 209.-120(g)(12)(vii) (1977), was similar.

Court finds that the Delta Pumping Plant was completed prior to December 18, 1968, the above regulation will exempt the State from obtaining an individual section 10 permit, provided that the facility does not interfere with navigation and so long as the regulation may be held to be a valid excercise of the Corps' authority.

VI. CONCLUSION

In summary, we hold that parties who suffer special injury have a private right of action to enforce compliance with the permit requirements of section 10. Sierra Club and the two individual appellees have standing to avail themselves this private right of action. We have already explained why, as to Friends of the Earth, the judgment was to be vacated and its complaint dismissed.

On the merits, the Tracy and Delta Pumping Plants fall within the ambit of section 10, since their operation has altered navigable waters of the United States. Because Congress affirmatively authorized the Tracy Pumping Plant, a Corps permit is not required for its present operational level. Therefore, we do not reach the question of whether an environmental impact statement is required for the Tracy Plant. The Delta Pumping Plant, which has not been authorized by Congress, must obtain a Corps permit for its operation, unless exempted by the Corps regulation, 33 C.F.R. § 322.4(g) (1978).[39] To the District Court, we ac-

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[39]We vacate the District Court order that the Secretary of the Army, or his delegate, prepare an environmental impact statement prior to issuing a section 10 permit for either pumping plant. *See* 400 F.Supp. at 651. An environmental impact statement is not required at the present time.

It is true that, under our decisions, an environmental impact statement may be required before the Corps can lawfully issue a permit for the Delta Pumping Plant, since federal approval — be it in the form of a permit, license, or otherwise — that allows a project to proceed constitutes "a major federal action" within the meaning of section 102 of the National Environmental Policy Act, 42 U.S.C. § 4332 (1970). *Cady v. Morton*, 527 F.2d 786, 793 (9th Cir. 1975); *Scientists' Inst. for*

cord the discretion to allow the pumping to continue at its present level pending the filing and processing of the permit application. Traditional equitable principles apply. *Cf. Kleppe v. Sierra Club*, 427 U.S. 390, 407-08, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976); *Cady v. Morton*, 527 F.2d 786, 798 n.12 (9th Cir. 1975).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

TANG, Circuit Judge, concurring:

One important aspect of this case concerns congressional authorization of the Tracy Pumping Plant. Specifically, we have concluded that Congress intended to authorize the Tracy Plant, and that the district court was in error when it concluded that the consent of Congress had not been obtained for the Plant's construction.

Our conclusion that the Tracy Pumping Plant was authorized by Congress rests in part upon our review of relevant appropriations measures which, when viewed in light of the entire record, evidence clear congressional consent to the Plant's construction and operation as mandated by Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403.

Public Information, Inc. v. Atomic Energy Comm'n, 156 U.S.App. D.C. 395, 404-405, 481 F.2d 1079, 1088-89 (D.C.Cir. 1973); *Davis v. Morton*, 469 F.2d 593, 597 (10th Cir. 1972). At this time, however, to order the preparation of an environmental impact statement for the Delta Pumping Plant would be premature. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). Under Corps regulations, the District Engineer makes the initial determination of whether an alteration or modification of navigable waters will require an environmental impact statement. 33 C.F.R. § 325.4(b) (1978). We can see no justifiable reason, in this case, to depart from what we perceive to be an orderly procedure. Not until the Corps has made its decision should a party in a case such as this seek relief in the courts.

There may be some question that our holding in this case might conflict with this court's recent decision in *Libby Rod and Gun Club v. Poteat,* 594 F.2d 742 (9th Cir. 1979). As a member of the majority in *Libby,* it is important to point out distinguishing differences between this case and *Libby.*

I

Authorizing Legislation

A review of the relevant authorizing legislation addressing the Tracy Pumping Plant and the Libby Dam Project highlights the distinction between the two cases.

On appeal from the district court's ruling that a reregulating dam had not been authorized as required under 33 U.S.C. § 401, the Army Corps of Engineers (Corps) argued in *Libby* that the Flood Control Act of 1950 authorized both the main Libby Dam and a reregulating dam. Upon examination of the Flood Control Act, the court concluded that the sole reference to reregulation was contained in ¶ 165 of H.R. Doc.No. 521, 81st Cong., 2d Sess. (1950) which had been incorporated in the Act. That paragraph, the court held, did not explicitly authorize a reregulating dam — to the contrary, it noted that reregulation would be considered "when the need arises." *Libby Rod and Gun Club v. Poteat,* 594 F.2d at 744. The court further concluded that this lone reference to reregulation could not be construed to authorize implicitly a reregulating dam, because: (1) it was not clear when the Flood Control Act was passed that a reregulating dam was necessary for the effective functioning of the main Libby Dam, and the Corps had cited no authority to support the proposition that a dam could be deemed authorized by necessity under 33 U.S.C. § 401; and (2) to imply authorization would frustrate the intent of Congress, evidenced in ¶ 165, to examine reregulation "when the need arises." Therefore, the court was not con-

vinced that Congress intended to authorize a reregulating dam in the Flood Control Act.

The authorizing legislation in the instant appeal paints a different picture of congressional intent.

First, the Rivers and Harbors Act of 1937, ch. 832 § 2, 50 Stat. 844, reauthorized the entire Central Valley Project. (Opinion at 602.) In that authorization, Congress explicitly authorized, *inter alia*, pumping stations necessary to the effective functioning of that project. Rivers and Harbors Act of 1937, 50 Stat. at 850; (Opinion at 602 n.31.) Unlike *Libby* therefore the original authorizing legislation recognized the possible need for pumping stations and seemingly *authorized their construction* if they became necessary to the functioning of the entire project.

Second, the Reclamation Project Act of 1939, 43 U.S.C. § 485h(a), deemed as authorized any reclamation project that the Secretary of Interior found to be feasible, and that the Secretary had submitted a favorable report upon to the President and Congress. (Opinion at 603.) In 1947 the Secretary forwarded to the President and Congress a favorable feasibility report of the Central Valley Project, which contained a detailed analysis of the Delta-Mendota Canal, one aspect of which is the Tracy Pumping Plant. (Opinion at 603.)

Unlike the Flood Control Act in *Libby*, the Reclamation Project Act was general legislation that allowed the Secretary of Interior to approve a project and the elements thereof, and such approval by the Secretary was deemed to represent authorization of the project.

Third, the Act of June 3, 1960, Publ.L.No. 86-488, 74 Stat. 156, authorized the construction of the San Luis Unit of the Central Valley Project. (Opinion at 29.) In that legislation, Congress explicitly "noted the precise location and

plans of the Tracy Pumping Plant as a critical and integral part of the San Luis Unit project." (Opinion at 604-605.)

The importance of these three facts cannot be underestimated. First, Congress recognized the necessity of pumping plants in the Rivers and Harbors Act; second, it granted the Secretary of the Interior broad authority to authorize reclamation projects; and third, other authorization legislation specifically referred to the Tracy Pumping Plant. When these facts are examined in light of subsequent appropriations, a result different from *Libby* is mandated.

II

Appropriations

In *Libby*, this court was confronted by conflicting legal arguments. The Corps contended that appropriations measures should be equated automatically with project authorization. The Rod and Gun Club conversely argued under *T.V.A. v. Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978) that appropriations could never be equated with authorization.

This court adopted a middle view, concluding that appropriations should not be regarded as measures that either automatically authorized, or failed to authorize, a given project. This view was based in part on *T.V.A. v. Hill*, where the Court held that appropriation bills and substantive enactments of Congress were distinguishable:

> We recognize that both substantive enactments and appropriations measures are "Acts of Congress," but the latter have the limited and specific purpose of providing funds for authorized programs.

Id. at 190, 98 S.Ct. at 2299-2300.

Importantly, the panel in *Libby* did *not* hold that *T.V.A. v. Hill* mandated that appropriations could never be regarded as representing authorization. Rather, *Libby* merely rec-

ognized that an analysis of legislative history was required before a conclusion could be made as to the effect of a given appropriations measure.[1] Although *T.V.A. v. Hill* was certainly a distinguishable case on numerous grounds, its direct recognition of the difference between appropriations measures and substantive enactments transcends the facts of that case. This point alone was relied upon in *Libby*.

The *Libby* court then proceeded to examine the facts of the case, and held that the appropriations for the reregulating dam could not be regarded as authorization. This conclusion was based on a combination of two factors: (1) the authorizing legislation not only failed to indicate that a reregulating dam was contemplated as part of the Libby Dam project, but suggested as well that an analysis of the need for a second dam would be undertaken if the need for such a dam arose; and (2) there was strong evidence in the record that the Corps had misled appropriations committees by asserting to committee members that the reregulating dam had been specifically authorized by the Flood Control Act. *Libby*, 594 F.2d at 746. Confronted with such a legislative background, the court was reluctant to hold that the appropriations represented the will of Congress and could thus be equated with the consent required under § 401.

The facts here in *Sierra Club* are decidedly different. First, the Rivers and Harbors Act of 1937 recognized that pumping stations might be necessary to the effective functioning of the Central Valley Project, and thus implicitly

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[1]1. *Libby* did recognize, however, that appropriations measures and the committee reports accompanying such measures are to be scrutinized closely when it is argued that such measures represent substantive authorization. This view arises from both *T.V.A. v. Hill* and *SEC v. Sloan*, 436 U.S. 103, 98 S.Ct. 1702, 56 L.Ed.2d 148 (1978), where the Court has suggested that isolated remarks in committee reports and hearings are not to be regarded as necessarily representing the will of Congress as a whole.

authorized such stations. *See Pigeon River Co. v. Cox*, 291 U.S. 138, 159-60, 54 S.Ct. 361, 78 L.Ed. 695 (1934). The funding of what Congress recognized as possible necessary aspects of a project creates a situation different than that existing in *Libby*, and the appropriations, when viewed in light of this original authorizing legislation, can be reasonably regarded as authorizing the Tracy Pumping Plant by implication.

Second, the Secretary of the Interior was given general authority to authorize specific projects under the Reclamation Project Act of 1939. When the Secretary found the Central Valley Project feasible and submitted a favorable report to Congress, specific appropriations for the pumping station take on a significance not found in *Libby*. Indeed, these facts place *Sierra Club* directly under this court's rulings in *United States v. Kennedy*, 278 F.2d 121, 122 (9th Cir. 1960) and *Polson Logging Co. v. United States*, 160 F.2d 712, 714 (9th Cir. 1947). In these cases, the court determined that when a government official had been given general authority to condemn land for public uses, appropriations for specific parcels could be regarded as congressional authorization to acquire that land. The facts of *Sierra Club* seem highly analogous, because the Secretary was given general authority to authorize reclamation projects. Thus, appropriations for the Tracy plant can be regarded under *Kennedy* as authorization.

Third, the recognition of the Tracy Pumping Plant in the authorizing legislation for the San Luis Unit creates a strong inference that Congress believed it had authorized the Tracy Pumping Plant, and again appropriations, when viewed in light of this fact, can reasonably be regarded as supporting the conclusion that the pumping plant had been authorized. In *Libby*, the Corps argued similarly that the Water Resources Development Act implicitly recognized the exist-

ence of the reregulating dam, because the Act authorized generators for the reregulating dam. This claim was rejected, because the Water Resources Development Act authorized design studies only. However, the *Libby* court did note that had generators been authorized for the reregulating dam, a strong inference would have arisen that Congress intended to authorize the necessary structure in which the generators were to be placed, *i.e.*, the reregulating dam.

The recognition in the San Luis Unit authorization of the Tracy Pumping Plant as a critical and integral part of the San Luis Unit project creates the "strong inference" of intent to authorize that which was lacking in *Libby*. This inference, combined with specific appropriations for the Tracy Pumping Plant, satisfies me that Congress has consented to the construction and operation of the Tracy Pumping Plant.

A final point should be made. Both the majority in this case and Judge Kennedy in his dissent in *Libby* rely heavily upon *United States v. Arizona*, 295 U.S. 174, 55 S.Ct. 666, 79 L.Ed. 1371 (1935) and *Wisconsin v. Duluth*, 96 U.S. 379, 24 L.Ed. 668 (1877) for the proposition that appropriations should be equated with authorization.

I do not read either *United States v. Arizona or Wisconsin v. Duluth* as necessarily controlling. Both cases predate *T.V.A. v. Hill*, and to read either case as representing a decision by the Court that appropriations measures automatically represent authorization for purposes of the Rivers and Harbors Act of 1899 is suspect in light of that decision. However, the dictum in *United States v. Arizona* did suggest that Congress had appropriated money for a certain Laguna Dam Project "and so recognized and approved the building of the dam." *United States v. Arizona*, 295 U.S. at 186, 55 S.Ct. at 670.

It would appear unwise to me to read this dictum overly broadly. The facts in *Arizona* do not make clear the exact specifics of the Laguna Dam Project, and the Court might have been persuaded by any number of factors to conclude that the appropriations represented authorization. Because none of these factors are directly addressed in the Court's decision, the *Libby* majority thought it reasonable to distinguish the dictum and rely instead on an independent analysis of the facts of the *Libby* case.

In review, the facts of *Libby* and *Sierra Club* are distinguishable. *Libby* held that appropriations were to be analyzed closely in light of the facts of a given case. When the facts of *Sierra Club* are so analyzed, we have concluded that appropriations, when combined with the original legislation relating to the Tracy Pumping Plant, represent the consent of Congress mandated by 33 U.S.C. § 403.

APPENDIX 3.

[400 F.Supp. 610].

SIERRA CLUB, a non-profit California Corporation, *et al.*, Plaintiffs, v. Rogers C. B. MORTON, as Secretary of the Interior of the United States, *et al.*, Defendants. No. C-71-500-CBR. United States District Court, N.D. California. July 28, 1975.

John B. Clark, Pettit, Evers & Martin, San Francisco, Cal., for plaintiffs Sierra Club, Friends of the Earth and Hank Schramm.

Michael R. Sherwood, San Francisco, Cal., Sierra Club Legal Defense Fund, for plaintiff Sierra Club.

Gary J. Near, San Francisco, Cal., for plaintiffs Friends of the Earth and William Dixon.

James L. Browning, Jr., U. S. Atty., Francis Boone, Richard J. Dauber, Asst. U. S. Attys., San Francisco, Cal., for federal defendants.

Evelle J. Younger, Atty. Gen., Carl Boronkay, R. H. Connett, Bertram G. Buzzini, Deputy Attys. Gen., Sacramento, Cal., for state defendants.

Victor E. Gleason, Los Angeles, Cal., for intervening defendant Metropolitan Water District of Southern California.

James G. McCain, Corcoran, Cal., for intervening defendant Tulare Lake Basin Storage District.

Albert Thomas Henley, San Jose, Cal., and Daniel F. Gallery, Sacramento, Cal. for intervening defendant Santa Clara Water District.

MEMORANDUM OF OPINION

RENFREW, District Judge.

In 1971 two environmental groups and two individuals brought this action to contest the allegedly unlawful con-

struction and operation of three major facilities of the California Water Project. The parties agreed to bifurcate the trial of the action into a liability phase and a relief phase. The liability phase was tried to the Court between June 10, 1974, and June 21, 1974. Subsequently, on July 26, 1974, the Court heard oral argument and at the conclusion of that argument informed the parties of its views as are more fully set forth herein.

The California Water Project has been constructed in part as a response to California's water problem. The essence of that problem is the need to redistribute the state's plentiful water supply from water-abundant areas to water-deficient areas. The water-rich areas lie in the North and West Central portion of the state. Water from these areas flows through a system of rivers and channels to the Sacramento-San Joaquin Delta ("Delta") and finally through the San Francisco Bay to the Pacific Ocean. One proposed solution to the state's water problem is transporting the excess water, which would normally flow into the ocean, to the arid or semi-arid areas of the state. A second and interrelated problem arises because the excess water is present in and flows out of the water-rich areas only during certain times of the year. Because the demand for water consumption for human use is relatively constant throughout the year and the agricultural demand varies during different times of the year, water which accumulates in the water-rich areas during the excess water seasons must be stored for use during the year if these demands are to be met.

A brief description of the geographical area underlying the subject matter of this suit will aid in understanding the facts of this case. The Delta is a roughly triangular-shaped region which runs southwest from Sacramento west of the Sacramento River to Antioch, which forms one corner of the triangle. It then runs southeast from Antioch to a point

approximately 10½ miles southeast of Tracy, which forms a second corner. Finally, it runs north from that point through Stockton to Sacramento, completing the triangle. Clifton Court Forebay, Delta Pumping Plant, and Tracy Pumping Plant are located on the edge of the Delta approximately half-way between Antioch and Tracy. The proposed route of the Peripheral Canal runs from the intake structure in the north Delta, south through the east Delta, and finally turns to the southwest, stopping between the Tracy Pumping Plant and the Clifton Court Forebay. In the southern Delta the San Joaquin River and its tributaries flow basically in a northwesterly direction while in the northern Delta the Sacramento River and its tributaries flow in a southwesterly direction.[1]

The California Water Project consists of both state and federal facilities. The federal component of the project is administered by the United States Bureau of Reclamation and is designated as the Central Valley Project. The state component of the project is administered by the Department of Water Resources, a department within the Resources Agency of the State of California, and is designated as the State Water Project.

The Central Valley Project, the federal project, consists of a series of reservoirs, pumping plants, canals, and other facilities designed to control the flow of water in the Sacramento River, San Joaquin River, and certain of their tributaries, generate hydroelectric power, provide flood control, and provide water for irrigation and other uses in the Central Valley of California. One of the principal facilities of the Central Valley Project is the Tracy Pumping Plant, located on an inlet channel of Old River in the Delta. The Tracy

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[1]See the map of the Delta attached hereto as Exhibit A.

Pumping Plant diverts water from the Delta by pumping it into the Delta-Mendota Canal, a 115-mile canal which leads to the Mendota Pool in the Central Valley.

The State Water Project, created by the Burns-Porter Act of 1959, was to consist of a system of dams, canals, pumping plants, and other facilities designed to transfer water across the Delta, provide for water conservation and flood and salinity control in the Delta, provide for the generation of power, and provide transfer water from points at or near the Delta to the San Francisco Bay Area, the San Joaquin Valley, the Central Coast, and Southern California. The Burns-Porter Act was submitted to and approved by California voters on November 8, 1960.

Substantially all of the water required annually by the State Water Project is to be obtained initially from the Sacramento and San Joaquin Rivers and their tributaries. Among the facilities constructed for this purpose are the Delta Pumping Plant and the Clifton Court Forebay which are located on the edge of the Delta. A majority of the water that is transported from Northern California to Southern and Central California travels through the Delta Pumping Plant and the California Aqueduct.

The State of California through its Department of Water Resources has entered into contracts providing that at some point in the future it deliver 4.23 million acre-feet of water annually by means of the State Water Project. The primary purchasers of water are the Kern County Water Agency, which has agreed to purchase 1,153,400 acre-feet annually, and the Metropolitan Water District of Southern California, which has agreed to purchase 2,011,500 acre-feet annually. It is expected that over 95% of the water which the State is contractually obligated to deliver to Central and Southern California will be transmitted through the Delta Pumping Plant.

Many controversies have been associated with the continuing development of this massive water project. This case, however, concerns the extent to which the decisions and actions of state and federal defendants must take into account navigational, environmental, fish, and wildlife considerations. The Delta, consisting of approximately 700 miles of meandering waterways, some of which are navigable, is used for both commercial shipping and recreational boating. Water skiing and houseboating are common activities in this region and there are many marinas within its confines. A significant amount of California warm water fishing, anadromous sport fishing, and approximately 80% of the commercial salmon fishing is dependent upon the environment in the Delta. Moreover, this region and its adjoining marshlands and wetlands are on the Pacific Flyway, an important wintering area and major and customary natural habitat for migratory waterfowl.

Plaintiffs in this case are The Sierra Club, Friends of the Earth, Hank Schramm, and William Dixon. The Sierra Club is a nonprofit California corporation having in excess of 130,000 members of whom more than 40,000 live in the San Francisco Bay and the Sacramento-San Joaquin Delta areas. Included in the membership of the Sierra Club are many persons who use the waters referred to in the complaint for recreational purposes, including, but not limited to, boating, fishing and swimming. The stated purposes of the Sierra Club include the preservation and conservation of the natural resources, fish and wildlife of the United States, including its rivers, bays, wetlands, deltas, and estuarine areas.

Friends of the Earth is a nonprofit New York corporation which has its principal place of business in San Francisco. Its stated purposes include the preservation, restoration, and rational use of the environment.

Hank Schramm is and has been engaged for the past 20 years in the business of commercial fishing and the operation of sports fishing party boats in the San Francisco Bay and the Pacific Ocean. Schramm has a economic interest in this controversy since he depends for his livelihood on the maintenance, preservation, and conservation of sports and commercial fisheries in the San Francisco Bay and the adjoining waters of the Pacific Ocean.

William Dixon owns substantial property in the Delta, including a partnership interest in the St. Germain Duck Club on Simmons Island, and consequently has an economic interest in the maintenance, preservation, and conservation of adequate non-polluted supplies of water in the Delta and San Francisco Bay regions.

Defendants are state and federal officials who administer the various agencies responsible for overseeing the operation, construction, and regulation of the facilities in question. The federal defendants are Rogers C.B. Morton, Secretary of the Interior; Gilbert Stamm, Commissioner of the Bureau of Reclamation; Howard H. Calloway, Secretary of the Army; William C. Gribble, Jr., Chief of Engineers of the United States Army; George B. Fink, Division Engineer of the South Pacific Division of the United States Army Corps of Engineers; Colonel Frederick J. Rockwell, District Engineer of the Sacramento, California District of the United States Army Corps of Engineers; and Colonel James L. Lammie, District Engineer for the San Francisco, California District of the United States Army Corps of Engineers. The state defendants are Norman B. Livermore, Jr., Secretary for Resources, and John R. Teerink, Director of the Department of Water Resources.[2]

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[2]For the purposes of this Memorandum of Opinion, defendants are named as they appeared in the Agreed Pre-Trial Order. The Court notes that all of the named defendants were sued in their official capacities and thus, even though some of those originally named no longer occupy those positions, by virtue of Rule 25(d)(1) of the Federal Rules of Civil Procedure their successors are deemed automatically substituted.

Plaintiffs' amended complaint alleged six claims for relief, namely, failure of defendants to comply with Sections 9 and 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401, 403 (first claim); Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 (second claim); Sections 2 and 3 of the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 662, 663 (third claim); Sections 101 and 102 of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4331, 4332 (fourth claim); the Estuarine Areas Act and the Federal Water Pollution Control Act, 16 U.S.C. § 1221 *et seq.* and 33 U.S.C. § 1151 et seq. (fifth claim); and the California Environmental Quality Act, California Public Resources Code § 21000 *et seq.* (sixth claim). In the pretrial order plaintiffs abandoned their second claim. Since the parties have at best cursorily asserted and argued with respect to the fifth claim, and since plaintiffs have offered neither findings nor conclusions with respect to that claim and none of the trial testimony or exhibits were directed toward that claim, the Court considers the fifth claim to have been abandoned at trial and does not discuss it in this Memorandum of Opinion.

The heart of this phase of the controversy is the legality and operation of the Tracy and Delta Pumping Plants and the proposed construction and operation of the Peripheral Canal.

I. FACTUAL BACKGROUND

A. The Tracy Pumping Plant

Construction began on the Tracy Pumping Plant ("Tracy Plant") in 1947 and was sufficiently completed by June 11, 1951, so that the facility could commence initial operation. The Tracy Plant was built by the Bureau of Reclamation at a point approximately two miles from the Old River and one mile south of the Clifton Court Tract. While the Tracy

Plant was being constructed, an intake channel was simultaneously constructed from the pumping plant northeast to Old River. The Tracy Plant consists of six pumps with a maximum pumping capacity of 4602 cubic feet per second (''cfs'') which lift the water supplied through the intake channel into the Delta-Mendota Canal. The Delta-Mendota Canal is the conduit through which federal water is transported to the Central Valley.

B. The Delta Pumping Plant

Construction commenced on the Delta Pumping Plant (''Delta Plant'') in July of 1963 and was sufficiently completed by late 1967 so that the Delta Plant could begin diverting Delta water at that time. It was not until February of 1969, however, that all construction was finished. The Delta Plant is approximately two miles southwest of the end of Italian Slough, an inlet off Old River. Originally water exported by the Delta Plant was transported through an intake channel connecting the Delta Plant with Italian Slough. The construction of this intake channel required the State to cut through the levee of the slough. The Delta Plant presently has seven pumping units with a combined capacity of 6300 cfs[3] which lift Delta water into the California Aqueduct. However, there is room for the installation of four additional pumping units which would increase capacity to 10,300 cfs,[4] and it is contemplated that at least the first of these pumps will be operational by 1980.

In order to obtain the ability to confine pumping to off-peak electrical hours, the State acquired the Clifton Court Tract and in December of 1967 commenced construction

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[3]Stated in other terms, the Delta Plant currently has the capacity to pump 12,600 acre-feet of water per day.

[4]If a pumping plant pumps at the rate of 1 cfs for 24 hours, it will pump 1.98 acre-feet per day.

of the facility which is an artificial body of water known as Clifton Court Forebay. Construction of this Forebay involved the excavation of land and the building of dikes or levees inside the existing levees which shielded Clifton Court Tract from Italian Slough, West Canal, and Old River. When the Forebay became operational in November of 1969, the end of the Italian Slough intake channel was closed, and the remainder of the channel was connected to the Forebay, thus creating the intake channel for the Delta Plant. The Forebay diverts water from the Delta through an intake structure consisting of five radial gates which connects the Forebay to West Canal. West Canal in turn is connected to Old River.

C. *The Peripheral Canal*

The State of California proposes to finance, construct, and operate a 42-mile canal, known as the Peripheral Canal, from a point near Hood, California, on the Sacramento River to a point near the headworks of Clifton Court Forebay and the intake channel for the Tracy Plant. The Peripheral Canal is designed to permit the State to transport high quality fresh water to the Delta and Tracy Plants by diverting water from a point on the Sacramento River upstream from both the point of salt water intrusion and the point where poorer quality water from the San Joaquin River joins the Sacramento River in order to insure that saline or poorer quality water from the Delta does not enter the pumps of the Delta or Tracy Plants. The Peripheral Canal is designed to provide sufficient quantities of water to the Delta and Tracy Plants so as to satisfy the present and future requirements of the California Water Project, to provide water quality control, and to improve fish and wildlife and recreation potentials in the Delta.

As presently proposed, the Peripheral Canal will be 30 feet deep, have a base width of approximately 200 feet, have a top width of between 400 and 500 feet, and have an anticipated capacity of approximately 23,000 cfs. This maximum capacity would be allocated in the following manner: 10,300 cfs would be allocated to the State Water Project facilities served by the Delta Plant, 6,500 cfs would be available to the Federal Central Valley Project,[5] and 6,000 cfs would be available for release into the Delta along the path of the Peripheral Canal. Although one witness estimated that the entire Peripheral Canal project would cost $240 million, inflationary forces could easily result in a much higher cost.

II. RIVERS AND HARBORS ACT OF 1899

A. *Private Right of Action*

In determining whether a private right of action is implicit in a statute not expressly providing one, four factors are relevant: (1) Is the plaintiff one of the class for whose especial benefit the statute was enacted; (2) Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one; (3) Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; and (4) Is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law? *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L. Ed.2d 26 (1975). *See Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 95 S.Ct. 1733, 44 L.Ed.2d 263 (1975); *National Railroad Passenger Corp. v. National Ass'n of*

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[5]It is not clear from the testimony how much of this figure would be available for pumping through the Tracy Plant.

Railroad Passengers, 414 U.S. 453, 457-458, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974) (hereafter *Amtrak*). *But cf. Stewart v. Travelers Corp.*, 503 F.2d 108, 110-111 n. 7 (9th Cir. 1974). Private rights of action are based on a public policy of allowing injured parties to obtain civil redress for injuries resulting from the violation of statutorily imposed duties where the maintenance of such actions would effectuate the purposes intended to be served by the Act and would not interfere with the operation of the statutory scheme. While the courts that have considered the issue have expressed diverse views,[6] the Court of Appeals in this Circuit has held *sub silentio* that a private right of action exists under Sections 9 and 10. *Alameda Conservation Association v. California*, 437 F.2d 1087, 1094-1095 (9th Cir. 1971) *Sierra*

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[6]The Court of Appeals for the Third Circuit has held that governmental enforcement is exclusive and that Congress did not create any civil cause of action in favor of private parties injured by any violation of the Act. *Red Star Towing and Transportation Co. v. Department of Transportation*, 423 F.2d 104, 106 (3d Cir. 1970). *See Hooper v. United States*, 331 F.Supp. 1056, 1058 (D.Conn. 1971). *Guthrie v. Alabama By-Products Co.*, 328 F.Supp. 1140, 1148 (N.D.Ala.1971), *aff'd.*, 456 F.2d 1294 (5th Cir. 1972), merely holds that although Section 13 of the Rivers and Harbors Act may create a federally protected right against deposit of refuse which injures navigation or anchorage, the injury of other private rights, even from deposits in violation of Section 13, does not give rise to a federal right of action nor does it supply a basis of federal jurisdiction. The crux of that decision was the court's belief that Section 13 was not enacted for the purpose or with the effect of creating a federal cause of action to protect riparian landowners from the kinds of water pollution that have traditionally been dealt with under the law of nuisance. *Ibid.*, at 1145. There the court simply did not find the plaintiffs within the class of persons for whose benefit the statute was enacted. *Bass Anglers Sportsman's Society v. Scholze Tannery, Inc.*, 329 F.Supp. 339, 348-349 (E.D.Tenn.1971), and *Bass Angler Sportsman Society v. United States Steel Corp.*, 324 F.Supp. 412, 416 (N.D., M.D. and S.D.Ala.), *aff'd., sub nom. Bass Anglers Sportsman Society v. Koppers Co.*, 447 F.2d 1304 (5th Cir. 1971), at best hold that no private right of action exists under Section 13 to redress public injuries. In fact, the Fifth Circuit has held that there exists a private right of action to redress specific injuries. *Neches Canal Co. v. Miller & Vidor Lumber Co.*, 24 F.2d 763, 765 (5th Cir. 1928).

Club v. Leslie Salt Co., 354 F.Supp. 1099, 1104-1105 (N.D.Cal.1972). In *Alameda Conservation* plaintiffs sought injunctive relief against defendant corporation alleging injury arising out of defendant's violation of Sections 9 and 10. The court, after concluding that all of the individual plaintiffs (but not the association) had standing to sue, reversed the district court's dismissal. Although the court did not explicitly discuss the question of whether a private right of action existed, it would not have reversed the district court's dismissal of the action unless it had so ruled *sub silentio*.[7] Moreover, in *Cort v. Ash, supra*, 95 S.Ct. 2080, the Supreme Court apparently construed *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 201-202, 88 S.Ct. 379, 19 L.Ed.2d 407 (1967), as recognizing the existence of a private right of action under the Rivers and Harbors Act of 1899, albeit under a different section of the Act. Finally, analysis of the Rivers and Harbors Act of 1899 in light of *Cort v. Ash* also leads the Court to conclude that a private right of action exists under Sections 9 and 10.

First, the Court concludes that plaintiffs are members of the class for whose especial benefit the statute was enacted. Sections 9 and 10 were enacted both to prevent injuries to private parties as a result of obstructions to navigable capacity which were not authorized by the United States and to allow the United States to regulate obstructions to the navigable capacity of its navigable waterways.[8]

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[7]Standing concerns whether a particular plaintiff is sufficiently connected with a cause of action to assert rights thereunder in a legal proceeding. Clearly, before a court can rule on the question of standing, there must be a determination that a private right of action exists. See *Amtrak, supra*, 414 U.S. at 456, 94 S.Ct. 690.

[8]Prior to its enactment the Supreme Court in *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 8, 8 S.Ct. 811, 31 L.Ed. 629 (1888), held that there was no common law of the United States which prohibited obstructions and nuisances in navigable rivers. In that case a *private*

Second, the Court concludes that there is no indication that it was the intent of Congress to preclude a private right of action.[9] In reaching this conclusion, the primary consideration is the signficance of the provisions empowering the the Attorney General to enforce the Act in appropriate proceedings. Preliminarily, the Court notes that the doctrine of *expressio unius est exclusio alterius*, recently given vitality in two United States Supreme Court decisions, has been held to be inapplicable to the Rivers and Harbors Act of 1899. *Wyandotte Transportation Co. v. United States*, *supra*, 389 U.S. at 200-204, 888 S.Ct. 379.[10] That being so, the only question is whether there is anything in the Act or the statutory scheme which indicates that Congress intended to vest exclusively in the Attorney General the en-

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party had obtained an injunction against the construction of a bridge over the Willamette River. Because the Court found that there was no federal common law prohibiting such a bridge and that the act admitting Oregon into the Union also did not prohibit such a bridge, it reversed the decision of the trial court and ordered the suit dismissed. It was in response to this case that Congress enacted the Rivers and Harbors Act. This Court believes this is clear evidence that the Rivers and Harbors Act was enacted to benefit those persons who are specifically injured by an unlawful obstruction to navigable capacity.

[9]The Court notes that it has not found and the parties have not cited any authorities which indicate a congressional intent to create a private right of action, with the exception of the above analysis of *Willamette Iron Bridge Co. v. Hatch*.

[10]In *Barbour* and *Amtrak* the court adopted the proposition that express statutory provision for one form of proceeding ordinarily implies that no other means of enforcement was intended by the legislature. *Securities Investor Protection Corp. v. Barbour*, *supra*, 95 S.Ct. 1733; *Amtrak*, *supra*, 414 U.S. at 458, 94 S.Ct. 690. The court further stated that that implication would yield, however, to clear contrary evidence of legislative intent as found in the legislative history and in the overall structure of the Act. This principle is no barrier in the instant case in view of the holding of the Supreme Court that the remedies specified in the Rivers and Harbors Act of 1899 are not exclusive. *See Wyandotte Transportation Co. v. United States*, *supra*, 389 U.S. at 200-201, 88 S.Ct. 379. In that case the court recognized that to limit the government to remedies explicitly authorized under the Act would withhold remedies that would ensure the effectiveness of the Act. The court was not prepared to impute to Congress a futility inconsistent with the great design of the legislation.

forcement of the Act. Section 12, 33 U.S.C. § 406, makes violations of Sections 9 and 10 a misdemeanor punishable by fine or imprisonment and further provides that:

> "* * * the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States."

This section grants jurisdiction to the district court to enforce by injunction removal of structures erected in violation of Sections 9 and 10. It further grants power to the Attorney General to institute such injunctive proceedings. Neither of these grants rise to the level of an express prohibition against private suits. Moreover, the first jurisdictional grant would seem to encompass all injunctive suits, both private and governmental. In a case involving a somewhat analogous statutory scheme, the United States Supreme Court held that a provision for enforcement by the Attorney General did not preclude a private right of action. See *Allen v. State Board of Elections*, 393 U.S. 544, 554-557, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969).[11] In view of that case and because the

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[11]In *Allen v. State Board of Elections*, a similar statute was before the court. There 42 U.S.C. § 1973j(f) provided that the district courts would have jurisdiction over proceedings brought pursuant to that section of the Voting Rights Act of 1965. Another subsection of that same section of the statute provided that the Attorney General may bring actions for preventive relief whenever any person engaged in acts prohibited by certain sections of the Voting Rights Act. 42 U.S.C. § 1973j(d). Nothwithstanding this explicit grant of power to the Attorney General, the court found that enforcement of the Voting Rights Act was not vested exclusively in him and held that a private right of action existed under Section 5 of the Voting Rights Act. In the instant case these two grants of power (*i.e.*, jurisdiction in the district court and power to enforce on the part of the Attorney General) are found in two separate clauses in one sentence rather than in two separate subsections of a statutory provision as in *Allen*.

Court believes that a private right of action is necessary to effectuate the purposes intented to be served by the Act, the Court cannot find, either expressly or impliedly, in Section 12 of the Rivers and Harbors Act any exclusive vestment of enforcement powers in the Attorney General. The Court does note that Section 17 provides, *inter alia*, that the Department of Justice "shall conduct the legal proceedings necessary to enforce" Sections 9 and 10.[12] In light of the language of that entire section, however, the Court believes that Section 17 merely creates a duty of enforcement in the Justice Department and vests exclusive enforcement of the criminal provisions in that department. Accordingly, the

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[12]Section 17 provides:

> "The Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of sections 401, 403, 404, 406, 407, 408, 409, 411, 549, 686, and 687 of this title; and it shall be the duty of United States attorneys to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of the Army or by any of the officials hereinafter designated, and it shall furthermore be the duty of said United States Attorneys to report to the Attorney General of the United States the action taken by him against such offenders so reported, and a transcript of such reports shall be transmitted to the Secretary of the Army by the Attorney General; and for the better enforcement of the said provisions and to facilitate the detection and bringing to punishment of such offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of the Army, and the United States collectors of customs and other revenue officers shall have power and authority to swear out process, and to arrest and take into custody, with or without process, any person or persons who may commit any of the acts or offenses prohibited by the said sections, or who may violate any of the provisions of the same: *Provided*, That no person shall be arrested without process for any offense not committed in the presence of some one of the aforesaid officials; *And provided further*, That whenever any arrest is made under such sections, the person so arrested shall be brought forthwith before a commissioner, judge, or court of the United States for examination of the offenses alleged against him; and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States." 33 U.S.C. § 413.

Court concludes that nothing in the Act precludes private suits to redress injury to private persons due to violations of the Act.[13]

Third, the Court concludes that allowance of a private right of action where a plaintiff alleges he has been specifically injured by a violation of Sections 9 and 10 is necessary to effectuate the purposes intended to be served by the Rivers and Harbors Act of 1899 and hence is consistent with the underlying purposes of the legislative scheme. Although the Attorney General can bring civil suits to redress such injuries, he has neither the time, staff, nor incentive to see that all injuries caused by violations of the Act are redressed. As in *Allen v. State Board of Elections, supra,* 393 U.S. 544, 89 S.Ct. 817, implication of a private right of action is necessary or the Rivers and Harbors Act of 1899 will become practically unenforceable against specific injuries to private parties. Accordingly, the Court concludes that implication of a private right of action under Sections 9 and 10 would be consistent with the broad purposes of the Act.[14]

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[13]The Court agrees that Congress intended to vest exclusive enforcement in the Attorney General of suits to redress public injuries due to violations of the Act. In the case of public injuries, Congress may have felt that no citizen should substitute his judgment for that of the government as to when the public interest required civil relief.

[14]The instant case is unlike *Barbour* where Congress created a corporate entity to solve a public problem and then provided for substantial supervision of its operations by an agency charged with the protection of the public interest (*i.e.*, the S.E.C.). It is also unlike *Amtrak* where the legislative intent and the statute itself clearly indicated that Congress was conferring a private right of action only on a limited class of private parties (*i.e.*, employees who were the beneficiaries of certain labor agreements). Additionally, by allowing a private action in *Wisconsin v. Illinois,* 278 U.S. 367, 49 S.Ct. 163, 73 L.Ed. 426 (1929), albeit by a state, the Supreme Court has at least *sub silentio* recognized the existence of a private right of action under Section 10.

Finally, although it might be remotely possible[15] for the plaintiffs to bring a common law nuisance suit in state court against the defendants, the Court concludes the instant case is not the type of action which is traditionally relegated to state law in an area basically the concern of the states. There is a federal interest in protecting persons from injuries resulting from unauthorized obstructions to the navigable capacity of navigable waters of the United States and possible federal intrusion into the area of state nuisance law is necessary so that the federal interest asserted here will not be compromised by contrary state law. *Cort v. Ash* is distinguishable as in that case the interest which plaintiff sought to vindicate (*i.e.*, breach of fiduciary duty by corporate directors arising out of an *ulta vires* expenditure of corporate funds) was not the federal interest (*i.e.*, dulling the impact of corporations on federal elections) which Congress had intended to protect when it enacted the Federal Election Campaign Act. *Cort v. Ash, supra,* 95 S.Ct. 2080. Accordingly, the Court concludes that the test established in *Cort v. Ash* requires the finding of a private right of action

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[15]It is not at all clear to the Court that a common law nuisance suit to redress the type of injuries alleged by plaintiffs in the instant case would be cognizable in state court. Traditionally suits of this nature could only be brought to redress injuries to property interests and hence the availability of a common law nuisance suit may be severely restricted in many cases. W. Prosser, *The Law of Torts,* §89 (4th Ed. 1971). Although California appears to have adopted a more liberal rule, *e.g.*, 36 Cal.Jur.2d, *Nuisances* § 30 (1957), which might conceivedly cover the instant factual situation, the Court need not determine the scope of California nuisance law, as the key factor here is that any possible federal intrusion in to the area of state nuisance law is necessary and proper to vindicate plaintiff's federal rights.

under Sections 9 and 10 of the Rivers and Harbors Act of 1899.[16]

B. *The Merits of the Claim*

Plaintiffs' first claim is that the construction and present operation of the Tracy and Delta Plants and the proposed construction of the Peripheral Canal, in the absence of the proper authorization, are in violation of Sections 9 and 10 of the Rivers and Harbors Act of 1899. 33 U.S.C. §§ 401, 403. The Court must determine whether the construction and operation of any of the three structures requires authorization pursuant to Sections 9 and 10, and if such authorization is or was required as to any of the structures, whether statutorily sufficient authorization was obtained.

1. *Section 9*

Section 9 provides that it shall be unlawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any navigable water until (1) the consent of Congress to such construction has been obtained, and (2) the plans for such construction have been approved by the Chief of Engineers and the Secretary of the Army. That

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[16]Federal defendants' reliance on *Amtrak, supra*, 414 U.S. 453, 94 S.Ct. 690, is inapposite. In that case the legislative history expressed a clear intent to exclude private suits, except as to certain cases, involving labor agreements where private suits were expressly authorized. 414 U.S. at 457-465, 94 S.Ct. 690. Nor does *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81 (2d Cir. 1972), support federal defendants' position. In that case the court held an individual may not sue on behalf of the public for general injuries caused by violations of the Rivers and Harbors Act of 1899. The court expressly reserved the question decided here, whether a private claimant specifically injured by a violation may sue for an injunction or damages. 457 F.2d at 89, 90 n. 16. See *James River & Kanawha Canal Parks, Inc. v. Richmond Metropolitan Authority*, 359 F.Supp. 611, 638-640 (E.D.Va), *aff'd.*, 481 F.2d 1280 (4th Cir. 1973), for a well-reasoned decision in support of the result reached here. Because this action is one brought not on behalf of the public but rather by private plaintiffs who allege specific injuries to themselves, the Court concludes that a private right of action exists in the present case.

section contains a proviso to the effect that state authorization may replace Congressional consent in the case of waterways whose navigable portions lie wholly within the boundaries of a single state. However, even in that case, approvals by the Chief of Engineers and by the Secretary of the Army are still required.[17]

With respect to the Peripheral Canal, it is clear that Section 9 authorization will be required before any party commences building the Canal as it is presently proposed. At the point where the Canal crosses the Middle River, the Canal will result in the complete damming of the river. Furthermore, there is presently no provision for the passage of boats past the Canal at this location. Such a closure of the Middle River will constitute the building of a "dike" within the meaning of Section 9. In *Citizens Committee for the Hudson Valley v. Volpe*, 302 F.Supp. 1083, 1089 (S.D.N.Y. 1969), *aff'd* 425 F.2d 97 (2d Cir. 1970), the court held that the word "dike" should be defined in ac-

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[17]33 U.S.C. § 401 provides:

"It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided further*, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army."

cordance with its ordinary meaning. The court found that dike meant, *inter alia*, "[a]n embankment for controlling or holding back the waters of the sea or a river". 302 F.Supp. at 1089. The Court notes that "dam" is defined as "a barrier preventing the flow of water". Webster's Third New International Dictionary, p. 571 (1971). Hence, even though the closure of Middle River will be caused by a structure denoted as a "canal", because that structure will have the effect of a "dam" or "dike", the Court finds that the Peripheral Canal is the type of structure regulated by Section 9. Because the Peripheral Canal will clearly be "in" the Middle River, the only issue remaining is whether Section 9 prohibits any dikes or only those dikes which obstruct navigation. Although the legislative intent underlying the enactment of Section 9 may well have been to prohibit unreasonable obstructions to navigable waters, it seems likely that Congress used the word "any" in Section 9 in order to reserve the right to determine whether a given structure created an unreasonable obstruction. Because the Peripheral Canal will obstruct navigation on the Middle River, however, either construction of Section 9 will include the Canal within the section's regulatory prohibitions. *Citizens Committee for the Hudson Valley v. Volpe, supra*, 302 F.Supp. at 1089. *But cf. Petterson v. Resor*, 331 F.Supp. 1302, 1306 (D.Ore. 1971).

With regard to the type of authorization required, since the navigable waters which the Peripheral Canal will obstruct are all wholly within California, Congressional consent is not necessary as long as the Canal is authorized by the California State Legislature. It is not clear to the Court whether the passage of the Burns-Porter Act constitutes such authorization, as that Act did not specifically envision the Peripheral Canal. Because no evidence was adduced at trial as to whether the legislature has subsequently authorized the construction of the Canal, the Court merely holds that

such authorization must be obtained prior to the commencement of construction. Moreover, defendants must obtain a Section 9 permit from the Corps of Engineers and the Department of the Army prior to construction.

With respect to the Delta and Tracy Plants, plaintiffs argue that various components of these facilities constitute the type of structures regulated by Section 9. Most of these components, however, are clearly not "over or in" any of the navigable waters in question, and those few components which arguably are "over or in" navigable waters are not the type of structure regulated by Section 9. Both of the main pumping plants of the Tracy and Delta Plants are at least two miles distant from any navigable waters and are connected thereto only through the construction of certain man-made inlet channels. The only components which would be said to be "over or in" navigable waters are the headworks and fish protective facilities of the Tracy Plant.[18] However, these components are not a "bridge, dam, dike, or causeway".[19] Accordingly, neither the construction

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[18]The headworks and fish protective facilities of the Delta Plant are not "over or in" navigable water because they are set back on a small inlet constructed by the state defendants off West Canal.

[19]The Court need not decide whether the Tracy Plant headworks or fish protective facility is "over or in" navigable waters, as neither structure fits within the definitions of any of the structures enumerated in Section 9. Clearly neither is either a "dam" or a "dike" as defined, *supra*, since neither is "an embankment for controlling or holding back the waters of the sea or a river" or is "a barrier preventing the flow of water". They also are not causeways, as neither is "a raised road across water or marshy land with water or marshy land on both sides of the road". *Citizens Committee for the Hudson Valley v. Volpe, supra*, 302 F.Supp. at 1089. Finally, neither structure is a bridge as neither is "a structure erected over a depression or obstacle to travel (as a river, chasm, roadway, or railroad) carrying a continuous pathway or roadway (as for pedestrians, automobiles, or trains)." Webster's Third New International Dictionary, p. 276 (1971). The scope of Section 10 of the Rivers and Harbors Act of 1899 is substantially broader than the proscriptions of Section 9 as the latter section regulates only several specific types of structures while the former section utilizes very general language so as to include within its proscriptions both certain specific structures and any structure which has the effect of obstructing navigable capacity.

of the Tracy or Delta Plants nor of any of their component structures was unlawful with respect to Section 9.

2. *Section 10*

Section 10 contains three proscriptive clauses. The first clause prohibits the creation of any obstruction to navigable capacity not affirmatively authorized by Congress. The second clause makes it unlawful to build or commence the building of certain structures except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army. Finally, the third clause makes it unlawful to alter or modify in any manner the condition or capacity of the channel of any navigable water unless such alterations or modifications are recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.[20]

a. *Scope of Section 10*

In determining whether Section 10 requires authorization of the three structures involved in this case, the Court confronts two threshold questions concerning the coverage of that section. First, defendants contend that because certain

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[20]33 U.S.C. § 403 provides:

> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

of these structures are not located over or in any navigable water, they are not within the ambit of Section 10. This contention is without merit. It is clearly established that Section 10 does not require the existence of an obstruction over or in navigable waters. *United States v. Republic Steel Corp.*, 362 U.S. 482, 486, 80 S.Ct. 884, 4 L.Ed.2d 903 (1960); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 708, 19 S.Ct. 770, 43 L.Ed. 1136 (1899). *See Wisconsin v. Illinois, supra,* 278 U.S. 367, 49 S.Ct. 163; *Sanitary District of Chicago v. United States,* 266 U.S. 405, 45 S.Ct. 176, 69 L.Ed. 352 (1925). In *Republic Steel* the obstruction to navigable capacity was caused by defendant's dumping of industrial solids into a river. In *Wisconsin v. Illinois* and in *Sanitary District of Chicago,* the obstruction consisted of a lowering of the water level of Lake Michigan as the result of the diversion of lake water through the Chicago River Drainage Canal. Finally, in *Rio Grande* the obstruction was caused by a dam in a portion of a nonnavigable waterway which fed into the navigable waters in question. Defendants' contention that Section 10 is inapplicable to the instant case because both the Delta and Tracy Plants are approximately two miles from navigable waters is untenable if these structures in fact create obstructions to navigable capacity. The test of whether a Section 10 permit is required for a particular project is not wholly dependent upon the location of specific structures but looks also to the operational effect of the project. It is not only the physical structure of the Delta Plant, the Tracy Plant, or the Peripheral Canal which is significant but also

the operation of these structures.[21] If the functional effect of these structures is to obstruct navigable capacity in the Delta, then Section 10 approval will be required.

Second, defendants contend that in order to establish a violation of Section 10, plaintiffs have to prove that the actions in question actually affect navigation. Yet the plain wording of the statute is directly at odds with such a construction. Moreover, Section 9 demonstrates that Congress must have been aware of the difference between obstructions to navigation and obstructions to navigable capacity. Although research has not revealed any case which is dispositive of this question,[22] the Court concludes that once

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[21]As far as the Peripheral Canal is concerned, it is not clear whether the necessity to obtain authorization under Section 9 preempts the need for Section 10 approval. See pp. 626-627, *supra*. It is the opinion of the Court that no such preemption automatically occurs. The two sections deal with different although possibly related problems and therefore satisfactory resolution of one would not necessarily imply adequate resolution of the other. More specifically, the consequences of the damming of Middle River may be different and are more or less independent from those which arise due to the diversion of water from the Sacramento River. Clearly, however, defendants are not precluded from seeking and obtaining Section 9 and 10 authorization from the Secretary of the Army in one proceeding or one permit application.

[22]The principal Section 10 cases are not dispositive of this question. Because the findings of fact of the lower court are not reported in *Sanitary District of Chicago*, it is not clear whether the plaintiff in that case introduced any evidence of effects on navigation caused by the diversion of water from Lake Michigan. There were apparently no witnesses at trial who testified that they actually observed the lowering of the Lake Michigan water level. 266 U.S. at 412, 45 S.Ct. 176. Plaintiff apparently relied on the analyses of expert witnesses. *Ibid.* The court also found that in 1913 the Secretary of War reviewed the Chicago Drainage Canal diversions, including "the obvious fact that so large a withdrawal would lower the levels of the Lakes and the overwhelming evidence that it would affect navigation". However, there is no indication that any of this evidence was adduced at trial. *Ibid*, at 430, 45 S.Ct. at 180. There is language in the opinion which strongly indicates that plaintiffs here need not prove a present effect on navigation. The court stated:

> "Evidence is sufficient, if evidence is necessary, to show that a withdrawal of water on the scale directed by the statute of Illinois threatens and will affect the level of the Lakes, and that is a matter which cannot be done without the consent of the United

there is a finding that the obstruction in question has a substantial effect on navigable capacity, it is not necessary to prove that on specific occasions the obstruction precluded or limited navigation on the waterway in question by specific vessels. Obstructions to navigation differ from obstructions to navigable capacity. The former denotes the actual, present obstruction of navigation while the latter denotes the potential or capacity to obstruct navigation currently or in the future. Proof of the former requires a showing that navigation by specific vessels is presently obstructed while proof of the latter only requires a showing that a condition exists which would obstruct navigation over the waterway if it existed. In the latter case all that is required is proof of the condition which creates the obstruction which has a substantial effect on navigable capacity. Once plaintiffs prove this fact, it is immaterial that they do not prove that navigation by specific vessels on the waterway in question is presently obstructed.

States, even were there no international covenant in the case." *Ibid.* at 426, 45 S.Ct. at 179.

Additionally, it is relevant to contrast the extent of the diversions in that case with those in the instant case. In *Sanitary District of Chicago*, the United States sought to enjoin any diversion of water from Lake Michigan in excess of 4,166 cfs (250,000 cubic feet per minute) while in the instant case the present combined water diversion of the Delta and Tracy Plants is 10,900 cfs. Also, Lake Michigan which has a surface area in excess of 20,000 square miles is a substantially larger body of water than those navigable waters in the Delta out of which the Tracy and Delta Plants will divert water. While the court in *Wisconsin v. Illinois, supra* 278 U.S. at 407-409, 49 S.Ct. 163, expressly found that the Chicago Drainage Canal had an adverse effect on navigation resulting in the loss of 3,346,000 ton miles of water haul on the Great Lakes, it also found that the operation of that canal lowered the water level in four of the Great Lakes by between approximately five and six inches. Finally, in *United States v. Republic Steel Corp., supra*, 362 U.S. at 489, 80 S.Ct. 884, the court reasoned that if the lowering of the water level could constitute an obstruction to navigable capacity, as in *Sanitary District of Chicago*, then the deposit of industrial solids in a navigable river resulting in a decrease in the water depth in that river also constituted an obstruction to navigable capacity. However, the court in *Republic Steel Corp.* did note the shallower water would affect navigation.

Under Section 10 therefore, the question before the Court with respect to each of the three structures involved in this case is whether the structure itself or its operational effect is an obstruction to the navigable capacity of any navigable water. The Supreme Court has defined "obstruction to the navigable capacity" to mean to interfere with or diminish the navigable capacity of the waterway in question.[23] *United States v. Rio Grande Dam & Irrigation Co., supra,* 174 U.S. at 709, 19 S.Ct. 770. Furthermore, whether construction and operation of a particular facility creates an obstruction to navigable capacity is a question of fact. *United States v. Rio Grande Dam & Irrigation Co., supra,* 174 U.S. at 709, 19 S.Ct. 770.[24]

Turning first to the Tracy Plant, the evidence adduced at trial establishes that the operation of the facility has two major effects on water in the Delta: (1) It tends to lower the water levels in the Delta, and (2) It causes net flow reversals.[25] Between 1945 and 1949 the Bureau of Reclamation conducted a study of the effect on Delta water levels of export pumping by the Tracy Plant. The study concluded that with a low flow[26] in the San Joaquin River and with

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[23]Navigable capacity means the capacity for navigation over any part of the waters in question when in their normal condition. *Hubbard v. Fort,* 188 F. 987, 996 (C.C.D. N.J.1911).

[24]In that case the court stated that not every appropriation of the upper waters of a navigable stream would constitute an obstruction to navigable capacity, but rather that the test was whether any such appropriation substantially interfered with navigable capacity within the limits where navigation was a recognized fact.

[25]Because the Delta is directly affected by the Golden Gate tidal cycle, water in the Delta channels and rivers tends to flow both up channel and down channel during the tidal cycle. However, for any given tidal cycle there is a greater volume of flow in one direction and the amount of this excess is the net flow. A net flow reversal occurs when the net flow for a given tidal cycle is in a different direction than the normal direction.

[26]Low flow was defined in the study as the worst condition that could occur.

the Tracy Plant pumping at the rate of 4600 cfs, the Delta water level in the vicinity of Clifton Court Ferry would be lowered approximately four inches, while there would be no measurable change in the Delta water level near the Stockton ship channel. This study utilized a hydraulic and mathematical model and was not based on actual data since the Tracy Plant was not in operation at that time. In 1968 further studies of the effect of the Tracy Plant pumping on Delta water levels were conducted by varying the pumping rates and measuring the actual effect on water levels at various points in the Delta. One study concluded that Delta water levels near the junction between the inlet channel and Old River would be lowered by 1/10 of a foot per 1,000 cfs pumped, and that Delta water levels would be lowered by decreasing amounts per 1,000 cfs in proportion to the distance from the Tracy Plant. Export pumping effects were measurable as far away as the San Joaquin and Sacramento Rivers. Furthermore, a preliminary draft, subject to review, of the State's Environmental Impact Report (Plaintiffs' Exhibit 17), predicted that at a future export rate of 15,000 cfs, water levels near the San Joaquin River[27] could be lowered as much as 1½ feet at low tide.[28]

The evidence also established that the operation of the Tracy Plant has caused a greater flow of San Joaquin River water into Old River toward the Tracy Plant than occurred under pre-Tracy Plant conditions, and during summer pe-

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[27]However, at trial, Gerald Cox, a civil engineer with the Department of Water Resources, testified that the preliminary draft was inaccurate in that the point referred to was actually at Clifton Court Ferry which he felt was some distance from the San Joaquin River.

[28]The data from part of the 1968 studies reflects the effect on Delta water levels from the combined export pumping of both the Tracy and Delta Plants. However, part of the study isolated the effects attributable to the Tracy Plant and reached almost the exact same results as the 1945-1949 study.

riods of low flow in the San Joaquin, there can be a net reversal in the flow of the San Joaquin River between San Andreas Landing and Old River. Additionally, operation of the Tracy Plant in conjunction with the Delta Cross Channel also draws water from the Sacramento River on the edge of the Delta to the interior Delta and to the export pumps.

Similarly, the operation of the Delta Plant tends to lower water levels in the Delta region and to cause net flow reversals. Prior to the construction of Clifton Court Forebay, the Delta Plant operations resulted in lowered water levels in Italian Slough and caused bank erosion problems due to the increased speed of flow. A test conducted by the State in August and September of 1968 indicated that an increase in pumping by 6100 cfs by both the Delta and Tracy Plants resulted in a lowering of the water level in Italian Slough by 9/10 of a foot. Subsequent tests indicated that diversions of water into Clifton Court Forebay would have an even greater effect on water levels in the Delta. Combined diversions by the Forebay intake facility and the Tracy Plant between 9600 and 12,000 cfs during both high high and low high tides resulted in a lowering of the water level at Clifton Court Ferry by 1 to 1½ feet and a lowering at Rindge Pump (located on the San Joaquin River) of just under 1/10 of a foot.[29] While there may be some question as to the accuracy of these figures, they are found to be the minimum effect on Delta water levels of water diversions by the Forebay and the Tracy Plant[30] since they were offered by the

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[29]Throughout this most recent test in May of 1974, the Tracy Plant operated at close to its maximum pumping capacity. Hence, the test results would seem to reflect only those changes in the water level due to the Delta Plant diversions.

[30]During the trial Dr. James A. Harder, an expert witness for the state defendants, stated unequivocally that if the Clifton Court Forebay radial gates were opened wide at low low tides, and the water level of the Forebay was lower than that at Clifton Court Ferry, then the water level outside the Forebay would be lowered.

state defendants. It is quite conceivable that the effects could be greater and it is highly probable if not certain that an expanded pumping capacity would result in even greater effects.

The operation of the Delta Plant has caused net flow reversals in the San Joaquin River during some summer months, and during most of the year in the Old and Middle Rivers. The state defendants marked for identification a chart which apparently illustrated some specific effects on flow reversals as a result of export pumping by the Delta and Tracy Plants. This exhibit was not introduced into evidence, and hence there is no detailed evidence of the magnitude of net flow reversals caused by export pumping. There was, however, testimony from which it can be inferred that operation of the Clifton Court Forebay intake facility has the potential to affect water velocities significantly in nearby channels.[31] Finally, a preliminary draft subject to revision, of the State's Environmental Impact Report on the Peripheral Canal contained statements from which the Court could infer that Delta export pumping through the Tracy and Delta Plants caused the Old and Middle Rivers to flow upstream occasionally at Bacon Island and caused the San Joaquin River to flow upstream occasionally below the head of Old River.

With respect to the proposed operation of the Peripheral Canal, the evidence established that there would be significant effects on the velocity and water level of the Sacramento River. If constructed, the Peripheral Canal will divert

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[31]There was testimony that the operation of the Clifton Court Forebay radial gates was limited by the state defendants so that the water velocity in the nearby channels would not exceed 3 feet per second. The reason for this operational limitation was to prevent bedload movement in the adjacent channels. Bedload movement is the movement of the bottom sands of the channel due to high water velocity.

waters from the Sacramento River near Hood, California. The rate of flow of water in the Sacramento River at that location varies between 10,000 cfs and 100,000 cfs. Donn J. Stafford, a civil engineer with the Department of Water Resources, testified that at various times during the year the Canal would divert significantly more than 50% of the Sacramento River flow and at times could divert as much as 80% of that flow. It also appeared that diversion would decrease the velocity and lower the water level of the Sacramento River downstream from the Peripheral Canal intake. Finally, the Canal would result in the closure or modification of a number of rivers and sloughs in the Delta including the complete damming of the Middle River. With respect to the Middle River closure, no provision has been made for the passage of boats past this point on the River.

In sum, with respect to the Delta and Tracy Plants the evidence adduced at trial was clear and convincing that export pumping by these facilities both lowered Delta water levels and at certain times caused net flow reversals in Delta waterways. Although it is true that the exact magnitude of these effects was not precisely established, it is clear that they are far from any sort of *de minimis* exception established by *Rio Grande*. Because there was evidence that the water level would be lowered at least one to 1½ feet in the vicinity of Clifton Court Ferry, the Court will not decide whether the smaller effects (i.e., several inches) at locations considerably more distant from the pumping plants, standing alone, would constitute a sufficient obstruction to navigable capacity so as to require Section 10 approval.

With respect to the Peripheral Canal, the evidence regarding the anticipated effects on navigable capacity was even less precise with respect to magnitude but equally convincing that the effect would be substantial. It was clear that at various times throughout the year the Peripheral Canal

would divert substantial amounts of water from the Sacramento River in the vicinity of Hood, California, and that these diversions would both lower the water levels and decrease water velocities downstream from the intake facility.

Accordingly, the Court concludes that the operation of the Tracy and Delta Plants presently obstructs the navigable capacity of various navigable waters in the Delta.[32] The Court further concludes that as presently proposed, the Peripheral Canal will also result in an obstruction to navigable capacity of the Sacramento River. More specifically, the Court finds that, in the case of each of the three facilities, the obstruction is the result of the modification or alteration of the condition or capacity of the channel of navigable water of the United States and hence is governed by the third clause of Section 10.

b. *Authorization under Section 10*

Since Section 10 requires that authorization be obtained for the construction and operation of the Tracy and Delta Plants and the proposed construction and operation of the Peripheral Canal, the Court now turns to the question whether any of these facilities has been properly authorized. Although the statute itself is somewhat unclear as to what constitutes proper authorization, in a case such as the instant one governed by the third clause, the United States Supreme Court definitively resolved this ambiguity in the landmark case of *Wisconsin v. Illinois, supra,* 278 U.S. 367, 49 S.Ct. 163. The Court held in that case that congressional author-

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[32]The operation of the Delta and Tracy Plants results in the obstruction of the navigable capacity of Old River, which is a navigable water of the United States. Since obstruction of the navigable capacity of this river suffices to bring the Tracy and Delta Plants within the scope of Section 10, the Court need not decide to what extent diversions by the Tracy and Delta Plants obstruct the navigable capacities of sloughs, canals, and other rivers in the Delta.

ization was not necessary for obstructions within the purview of the second and third clauses of Section 10 and that those obstructions need only be recommended by the Chief of Engineers and authorized by the Secretary of the Army.[33] 278 U.S. at 412-413, 49 S.Ct. 163. While congressional consent is an alternative, it is not necessary for obstructions falling within the second and third clauses of Section 10 if the approval of the Secretary of the Army is obtained.

Accordingly, the Court addresses the question whether any of the three facilities has been authorized by Congress or by the Secretary of the Army upon recommendation by the Chief of Engineers. With respect to the Peripheral Canal, defendants make no contention that such authorization has been obtained.[34] With respect to the authorization of the Delta and Tracy Plants, defendants have made three basic contentions regarding authorization: (1) that various Section 10 permits which have been issued over the years authorize the facilities, (2) that approval of the navigation aspects of the subject matter of FPC license application No. 2426 by the Secretary of the Army and the Chief of Engineers eliminates the need for Section 10 approval, and (3) that any number of congressional acts (mostly appropriation acts)

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[33]The main problem is interpreting the interrelationship of the three clauses in Section 10. These could be read as three independent prohibitions proscribing three different and mutually exclusive types of obstructions. However, in one early case, a lower court held that congressional consent was mandatory as to each type of obstruction and that clauses two and three were merely delegations to the Secretary of the Army of a supervisory power over the character and performance of the proposed construction where the work in question was of the specific type described in those clauses. *Hubbard v. Fort, supra,* 188 F. at 997. That position was expressly overruled in *Wisconsin v. Illinois, supra.* 278 U.S. at 412-413, 49 S.Ct. 163.

[34]With respect to the Peripheral Canal, it is conceded that its construction will require authorization under Sections 9 and 10 of the Rivers and Harbors Act of 1899. For the reasons set forth herein, a permit under Section 10 will likewise be required for its operation.

constitute congressional consent pursuant to clause one of Section 10. For the reasons set forth below, the Court disagrees with all three contentions and, accordingly, finds the construction and operation of the Tracy and Delta Plants without the required authorization to be unlawful.

i. *Section 10 Permits*

The federal defendants contend that the Secretary of War approved the Tracy Plant in a letter to the Secretary of Interior dated February 15, 1946. At the trial that letter was never offered as an exhibit and although the federal defendants never abandoned this contention, they did not provide the Court with a copy. The Court, taking judicial notice of the letter which is contained in S.Doc. No. 113, 81st Cong., 1st Sess. 275 (1949), obtained a copy of the letter from the Public Library. An examination of this letter revealed that its subject matter basically concerned a jurisdictional dispute between the Department of Interior and the Department of War over the construction and operation of reservoir projects in the Sacramento-San Joaquin Basin. Nowhere in the letter was the Tracy Plant specifically mentioned. The only tenuous connection between the Tracy Plant and the letter is that the Tracy Plant was part of the broad plan for the Central Valley Basin referred to in the letter. The letter on its face characterizes itself as the views and recommendations of the War Department on the Bureau of Reclamation's report on the Central Valley Basin pursuant to Section 1 of the Flood Control Act approved December 22, 1944. Additionally, this letter does not rise to the level of formality of the other Section 10 permits introduced into evidence. Not only does this letter not constitute a Section 10 permit, it is clear that it does not even constitute approval of the Tracy Plant.

The federal defendants next contend that in any event in 1955 the Bureau of Reclamation applied for and received

a permit to construct fish collecting facilities and headworks at the junction of the Old River and the Tracy Plant intake channel, and that this permit constitutes Section 10 authorization. However, the narrow scope of that permit simply does not support such a contention. It provided specifically that "[t]he structures and work shown on the drawings hereto attached and presented in your letter dated 25 August 1955, for construction of headworks and fish collecting facilities at the junction of Old River and the Delta-Mendota Canal, Contra Costa County, California, have been recommended by the Chief of Engineers and are authorized by the Secretary of the Army." See Plaintiffs' Exhibit 22. In this permit no mention is made of the other structures (*i.e.*, the pumping plant) or of the operation of those facilities. The limited scope of the permit is also reflected in the Bureau of Reclamation's application. That application describes the proposed construction of the headworks and fish collecting facilities. It specifically states that "[r]equest is hereby made for a permit for the Bureau of Reclamation to construct the headworks and fish collecting facilities in accordance with the above data and drawings." See Plaintiffs' Exhibit 22. Additionally, in the application, the Bureau of Reclamation states that it is not sure whether "a permit from you will be necessary *to perform this particular work*" (emphasis supplied), but is submitting one anyway so that the Corps can make the determination. See Plaintiffs' Exhibit 22.

The state defendants contend that various Section 10 permits issued with respect to certain components of the Delta Plant constitute authorization under Section 10 of the construction and operation of the entire Delta Plant and not merely the specific components. The Department of Water Resources at no time applied for a permit from the Chief of Engineers or the Secretary of the Army pursuant to Sec-

tions 9 and 10 of the Rivers and Harbors Act of 1899 with respect to the construction of the Delta Plant or its original intake channel. It did, however, apply for several Section 10 permits in conjunction with the construction of Clifton Court Forebay. On June 28, 1966, the Department of Water Resources applied for a Section 10 permit authorizing it to build a permanent dike across Italian Slough approximately one mile southwest of Old River. Although the Corps issued such a permit (#4014) on February 10, 1967, the Department of Water Resources abandoned its plan and instead built a closure dike at the junction between the original intake channel and Italian Slough.[35] On February 24, 1967, the Corps issued a permit (#4006) authorizing the construction and maintenance of a water quality monitoring recorder station in Old River at Clifton Court Forebay. On May 3, 1967, the Department of Water Resources applied for a Section 10 permit to cut the westerly levee of West Canal and Old River in order to build an inlet control structure for Clifton Court Forebay. Subsequently, permit #4101 was issued on June 15, 1967, authorizing the cutting of the westerly levee of West Canal. Finally, on June 17, 1969, the Corps of Engineers issued permit #4410 authorizing the Department of Water Resources to install velocity meters and bury armored cables five feet deep in West Canal. That permit contained a condition requiring the Department of Water Resources to comply promptly with regulations of the Federal Water Pollution Control Administration and/or the state water pollution control agency having jurisdiction.

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[35]It should be noted that the Department of Water Resources never received a permit to construct this dike. However, in its application for a permit to construct the Clifton Court Forebay inlet control structure, see *infra*, the Department did state that "[w]hen the forebay becomes operational, we will close our present inlet structure by replacing a section of the Italian Slough levee." See Plaintiffs' Exhibit 25.

The Court finds that these permits do not constitute Section 10 authorization. These permits authorized only the specific construction work described in the applications and not the construction of the entire pumping plant facilities. It is insufficient to assert that because the Corps of Engineers was a member of the Interagency Delta Committee and a participant in other studies of Delta water problems, it must have had constructive knowledge of the entire facility, and consequently that approval of the components must be deemed approval of the whole facility. There is no direct evidence from the particular permit files that the Corps was approving the entire facility when it approved the various components.[36] Even assuming strong circumstantial evidence of constructive knowledge, this evidence would not constitute approval of the construction of the facilities. The fact that the Corps had knowledge of the Delta Plant does not imply that it approved the Delta Plant. Additionally, it is clear that all of these permits were obtained after construction had commenced. Even if the Court believed that these permits authorized the *construction* of the Delta Plant, it is clear that they do not authorize the *operation* of that facility. Because of the clear adverse effects on navigable capacity and the possible adverse enviromental effect of export pumping under certain factual situations, it is inconceivable that the Corps of Engineers would have granted any permits without incorporating certain conditions of operation therein, and without appending in its files a sufficient factual record to show the type of consideration required by the Rivers and Harbors Act of 1899 and the various

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[36]See Plaintiffs' Exhibits 22, 22A, 23, 24, 24A, 25, 25A; State Defendants' Exhibit 11.

environmental statutes then in effect.[37] The Department of Water Resources recognizes certain adverse effects of the Delta Plant diversions, and it has an operational policy of never opening the Forebay radial gates during the three-hour period before and after low low tide. Additionally, it operates those radial gates so as never to allow the water velocity in the nearby channels to exceed three feet per second. In the absence of a clear showing that the Corps was in fact approving the operations of these facilities, the Court is compelled to find no authorization through the Section 10 permit procedure. It seems most likely that the Corps misconstrued the scope of Section 10's coverage.[38]

ii. The FPC License

The state defendants next contend that approval by the Corps of Engineers of the navigational aspects of the subject matter underlying FPC license application No. 2426 constituted Section 10 approval or eliminated the need to obtain Section 10 approval. In December of 1965 the state applied for a Federal Power Commission license for the California Aqueduct and certain other structures, some of which were power related. Among the structures included in the application were the Delta Plant and its appurtenant structures and the Clifton Court Forebay. FPC procedures required the administrative law judge to submit the application to the Corps of Engineers for approval of all navigational aspects of the Project. See 16 U.S.C. § 797(e). Although the Corps

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[37]For instance, the permits might have limited export pumping to certain levels during the dry parts of the year and during certain parts of the tidal cycle.

[38]In considering an application for a Section 10 permit, the Secretary of the Army and the Chief of Engineers must weigh the conservation effects of the subject matter of the application. *Zabel v. Tabb*, 430 F.2d 199, 213 (5th Cir. 1970), cert. denied, 401 U.S. 910, 91 S.Ct. 873, 27 L.Ed.2d 808 (1971). Moreover, the Secretary of the Army can refuse to issue a Section 10 permit on conservation grounds. 430 F.2d at 214.

sent approval in the form of a letter dated May 18, 1966, there is no evidence that the Corps gave consideration either to environmental factors or to the effect on navigation of water diversions (*i.e.*, by causing changes in water levels and net flow reversals). Although the administrative law judge eventually authorized the license, the FPC reviewed his decision and confined the jurisdiction of the license to those portions of the project involving power facilities, all of which are in Southern California. *Department of Water Resources*, FPC Opinion No. 688 (February 6, 1974).[39]

The Court finds the state defendants' contentions with respect to FPC license application No. 2426 unfounded. It is not entirely clear to what extent FPC jurisdiction and regulation preempts regulation by Sections 9 and 10 of the Rivers and Harbors Act of 1899. One court has held that no Section 10 permit is required for the construction of a hydroelectric plant licensed by the FPC. *Scenic Hudson Preservation Conference v. Callaway*, 370 F.Supp. 162, 167 (S.D.N.Y.1973) *aff'd* 499 F.2d 127 (2d Cir. 1974). The Court does not believe that that decision was intended to allow back-door approval of any structure however remotely related to the basic power project. In *Scenic Hudson* the court limited its holding to the hydroelectric plant. In the instant case the FPC restricted its jurisdiction to those portions of the project involving power facilities and hence *Scenic Hudson* is unhelpful to the state defendants. The rationale underlying *Scenic Hudson* is that there should be one centralized procedure to obtain federal approval of power projects. Its purpose was not to grant an applicant blanket approval for any and all facilities which he described

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[39]The Court notes that the FPC also remanded the license proceeding to the administrative law judge in order to comply with the NEPA procedures outlined in *Greene County Planning Board v. Federal Power Commission*, 455 F.2d 412 (2d Cir. 1972).

in his license application. Additionally, it is no assistance to state defendants that the Corps sent its letter of approval prior to the FPC's jurisdictional decision. It is quite possible that the Corps felt it was granting approval only to those structures over which the FPC eventually asserted jurisdiction. Also, because the Corps' letter was dated May 18, 1966, and because the state's FPC license application was not amended to include the Clifton Court Forebay until July 10, 1967, it is clear that the May 18th letter did not take into account the Clifton Court Forebay.[40] Notwithstanding *Scenic Hudson* because the Delta Plant will not be within the jurisdiction of any subsequently issued FPC license No. 2426, the Court must independently assess the May 18th letter and determine whether that constituted Section 10 authorization of the operation of the Delta Plant. The Court concludes that the Corps never seriously took under consideration the effect of water diversions by the Delta Plant when it sent its letter of approval. The letter itself states that "[t]he plans of the structures affecting navigation are satisfactory". This language tends to indicate that if the Corps gave consideration to anything, it was the structures themselves and not the operation of those structures. In the absence of a clear showing that the Corps intended their letter to serve as a Section 10 approval for the Delta Plant, the Court refuses to so construe it.

iii. *Congressional Authorization*

The Court also concludes that Congress did not affirmatively authorize any of the facilities in question. Defendants concede that they have obtained no congressional approval

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[40]In the Agreed Pre-Trial Order the state defendants contended that there was a second letter from the Corps to the FPC dated January 25, 1968. See Agreed Pre-Trial Order, § 4.52. Although that letter was introduced into evidence, it did not in any way indicate approval of the navigational aspects of the project.

of the Peripheral Canal. The federal defendants contend, however, that certain acts of Congress (including, *inter alia*, appropriation acts) constituted consent to the Tracy Plant. Without specifically discussing each individual act, the Court makes the following observations. The initial authorization to create an obstruction must rest on express and not implied congressional authority. *Cf. Hubbard v. Fort, supra,* 188 F. at 996. The approval or funding of a facility does not compromise Congress's right to control its operation. *Sanitary District of Chicago v. United States, supra,* 266 U.S. at 428, 45 S.Ct. 176.

In the instant case none of the acts in question either contain sufficiently explicit language or are accompanied by a legislative history clearly manifesting approval of the facilities for the purpose of Section 10. For the most part these acts do not even refer specifically to the pumping plant but rather are very general approvals of the Central Valley Project or the San Luis Unit.[41] All Congress did was au-

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[41]In the Act authorizing the construction of the San Luis Unit of the Central Valley Project, Congress imposed certain restrictions on the operation of that unit. Public Law 86-488, 74 Stat. 156. Specifically, Section 4 of that Act purportedly limited the daily diversion from the Delta via the Tracy Plant under certain conditions. Even if this section were effective, it does not constitute congressional consent. The Act authorized the San Luis Unit (consisting of, *inter alia*, the San Luis Dam, the San Luis Reservoir, the San Luis Forebay (O'Neil Forebay), and the San Luis Canal (California Aqueduct)) and not the Tracy Plant which was already in operation. The fact that Congress places certain limitations on the operation of an already existing facility does not, standing alone, constitute Section 10 authorization for the already existing facility. Section 4 would be just as consistent with an intent to require the diversion of high quality water as it would with an intent to solve navigational and environmental problems in the Delta. Moreover, that section may not be effective, since it appears to be conditioned upon the operation of the San Luis works *solely* as a federal project. The San Luis works are joint use facilities of the state and federal governments. See Agreed Pre-Trial Order, § 3.22. Further, this Act was enacted several years after the commencement of the operation of the Tracy Plant, and hence even if it were intended as Congressional consent, the original construction and operation of the Tracy Plant were unlawful.

thorize the construction of those projects and appropriate funds for them. Congress did not, however, agree to relinquish its Section 10 responsibilities or exercise this power in any respect.[42] Even if Congress had gone so far as specifically to fund the construction of the Tracy Plant precisely as it stands today, this fact would not constitute authorization to operate it, as before operation occurred, either Congress or the Corps of Engineers would have to consider within what Section 10 parameters the Tracy Plant could operate and issue an appropriate authorization.

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[42] In *Sanitary District* the Secretary of War had turned down the defendants' Section 10 permit application. Defendants had argued that a prior congressional act granting land to the State of Illinois for a canal to unite the waters of the Illinois River with those of Lake Michigan constituted authorization. The Court rejected their contention stating that:

> "The act granted land to Illinois in aid of a canal to be opened by the State for the purpose of uniting the waters of the Illinois River with those of Lake Michigan, but if it has any bearing on the present case it certainly vested no irrevocable discretion in the State with regard to the amount of water to be withdrawn from the Lake. It said nothing on that subject. We repeat that we assume that the United States desires to see the canal maintained and therefore pass by as immaterial all evidence of its having fostered the work. Even if it had approved the very size and shape of the channel by act of Congress it would not have compromised its right to control the amount of water to be drawn from Lake Michigan. It seems that a less amount than now passes through the canal would suffice for the connection which the United States has wished to establish and maintain." 266 U.S. at 427-428, 45 S.Ct. at 179. State defendants' reliance upon *Friends of the Earth v. Armstrong*, 485 F.2d 1 (10th Cir. 1973) *en banc*, *cert. denied*, 414 U.S. 1171, 94 S.Ct. 933, 39 L.Ed.2d 120 (1974), is misplaced. There, congressional intent was quite explicit both on the face of the acts in question and in the accompanying legislative history. Similarly, in *United States v. Dickerson*, 310 U.S. 554, 555, 60 S.Ct. 1034, 84 L.Ed. 1356 (1940), the Court held that Congress could suspend certain provisions of a prior act (military re-enlistment allowances) through an amendment to an appropriation bill. However, in that case congressional intent was manifestly clear from both the language of the Act and the Legislative history.

Accordingly, the Court concludes that the operation of the Tracy and Delta Plants obstructs the navigable capacity of various waters in the Delta, and because these obstructions are the result of the modification or alteration of the condition or capacity of the channel of navigable water, they are governed by the third clause of Section 10. Additionally, because the Court concludes that appropriate authorization has not been obtained, the operation of the Tracy and Delta Plants is and will be unlawful until the proper authorization is obtained. The Court also concludes that, as presently proposed, the operation of the Peripheral Canal will obstruct the navigable capacity of navigable water of the United States, and this obstruction will be governed by the third clause of Section 10. Because the parties concede that no authorization has been obtained for the Canal, operation of the Canal in the absence of proper authorization would be unlawful.

III. FISH AND WILDLIFE COORDINATION ACT

In their third claim for relief, plaintiffs allege that the construction and operation of the Delta and Tracy Plants, and the proposed construction and operation of the Peripheral Canal, are in violation of Sections 2 and 3 of the Fish and Wildlife Coordination Act (FWCA), 16 U.S.C. §§ 662 and 663.

Section 1 of FWCA is a general policy statement setting forth a declaration of the congressional purpose underlying the Act, namely, that wildlife conservation receive equal consideration with other features of water-resource development.[43] Whenever the waters of any body of water are

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[43]Section 1 provides:

"For the purpose of recognizing the vital contribution of our wildlife resources to the Nation, the increasing public interest and

proposed or authorized to be impounded or diverted by any federal agency or by any public or private agency acting under Federal permit or license, Section 2(a) of FWCA requires that agency first to consult with the United States Fish and Wildlife Service and with the state agency having jurisdiction over fish and wildlife with a view to the conservation of wildlife resources.[44] Section 2(b) requires, *inter-*

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significance thereof due to expansion of our national economy and other factors, and to provide that wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs through the effectual and harmonious planning, development, maintenance and coordination of wildlife conservation and rehabilitation for the purposes of sections 661 to 666c of this title in the United States, its Territories and possessions, the Secretary of the Interior is authorized (1) to provide assistance to, and cooperate with, Federal, State, and public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat, in controlling losses of the same from disease or other causes, in minimizing damages from overabundant species, in providing public shooting and fishing areas, including easements across public lands for access thereto, and in carrying out other measures necessary to effectuate the purposes of said sections; (2) to make surveys and investigations of the wildlife of the public domain, including lands and waters or interests therein acquired or controlled by any agency of the United States; and (3) to accept donations of land and contributions of funds in furtherance of the purposes of said sections." 16 U.S.C. § 661.

[44]Section 2(a) provides:

"Except as hereafter stated in subsection (h) of this section, whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development." 16 U.S.C. § 662(a).

alia, that Section 2(a) reports be made an integral part of any report prepared or submitted by a federal agency responsible for engineering surveys to Congress or to any agency having the authority to authorize the construction of the water resource development project.[45] Finally, Section 3(a) states that where a federal agency diverts or impounds water, adequate provision consistent with the primary purposes of the diversion shall be made for the conservation, maintenance and management of wildlife resources, including the development and improvement of wildlife re-

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[45]Section 2(b) provides:

"In furtherance of such purposes, the reports and recommendations of the Secretary of the Interior on the wildlife aspects of such projects, and any report of the head of the State agency exercising administration over the wildlife resources of the State, based on surveys and investigations conducted by the United States Fish and Wildlife Service and such State agency for the purpose of determining the possible damage to wildlife resources and for the purpose of determining means and measures that should be adopted to prevent the loss of or damage to such wildlife resources, as well as to provide concurrently for the development and improvement of such resources, shall be made an integral part of any report prepared or submitted by any agency of the Federal Government responsible for engineering surveys and construction of such projects when such reports are presented to the Congress or to any agency or person having the authority or the power, by administrative action or otherwise, (1) to authorize the construction of water-resource development projects or (2) to approve a report on the modification or supplementation of plans for previously authorized projects, to which sections 661 to 666c of this title apply. Recommendations of the Secretary of the Interior shall be as specific as is practicable with respect to features recommended for wildlife conservation and development, lands to be utilized or acquired for such purposes, the results expected, and shall describe the damage to wildlife attributable to the project and the measures proposed for mitigating or compensating for these damages. The reporting officers in project reports of the Federal agencies shall give full consideration to the report and recommendations of the Secretary of the Interior and to any report of the State agency on the wildlife aspects of such projects, and the project plan shall include such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain maximum overall project benefits." 16 U.S.C. § 662(b).

sources, pursuant to the provisions of Section 2.[46] Although FWCA was amended in 1958, the predecessor provisions had substantially the same language and created equally extensive duties.

The Court first addresses the question whether any private right of action arises under FWCA. The only authority on this question of which the Court is aware has answered in the negative. *Environmental Defense Fund, Inc. v. Corps of Engineers,* 325 F.Supp. 749, 754 (E.D.Ark.1971). See *Environmental Defense Fund, Inc. v. Corps of Engineers,* 325 F.Supp. 728, 739 (E.D.Ark. 1971). Further, plaintiffs simply have not established that inference of such a private right of action would be consistent with the legislative intent of FWCA and with the effectuation of the purposes intended to be served by the Act, as required by *Cort v. Ash, supra,* 95 S.Ct. 2080; *Securities Investor Protection Corp. v. Barbour, supra,* 95 S.Ct. 1733; and *Amtrak, supra,* 414 U.S. at 457-458, 94 S.Ct. 690. It seems likely that congressional enactment of the National Environmental Policy Act acts

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[46]Section 3(a) provides:

"Subject to the exception prescribed in section 662(h) of this title, whenever the waters of any stream or other body of water are impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, adequate provision, consistent with the primary purposes of such impoundment, diversion, or other control, shall be made for the use thereof, together with any areas of land, water, or interest therein, acquired or administered by a Federal agency in connection therewith, for the conservation, maintenance, and management of wildlife resources thereof, and its habitat thereon, including the development and improvement of such wildlife resources pursuant to the provisions of section 662 of this title." 16 U.S.C. § 663(a).

as an implicit proscription of such a private right of action.[47] Additionally, H. R. 14527 introduced in the House of Representatives in 1974 would amend FWCA so as explicitly to establish a private right of action. H.R. 14527, 93d Cong., 2d Sess. §10 (1974). Although not conclusive evidence with respect to the instant issue, H.R. 14527 does indicate that at least certain members of Congress believe that further legislation is necessary to create a private right of action under FWCA. The Court concludes that no private right of action arises under FWCA and, accordingly, the Court dismisses plaintiffs' third claim with prejudice.

IV. NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

Plaintiffs' fourth claim for relief alleges that the construction of the proposed Peripheral Canal and the proposed increases in the volume of water to be pumped at the Tracy and Delta Plants, together with any modifications thereto necessary to accommodate such increases will violate the National Environmental Policy Act (NEPA), 42 U.S.C. §4321 *et seq.*, unless adequate Environmental Impact Statements (EIS) are first prepared by the responsible federal agencies.

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[47]The courts have held that compliance with the National Environmental Policy Act will automatically satisfy the requirements of FWCA and that there will be no need separately to comply with FWCA. *Environmental Defense Fund, Inc. v. Froehlke*, 473 F.2d 346, 356 (8th Cir. 1972). *See Environmental Defense Fund, Inc. v. Corps of Engineers, supra*, 325 F.Supp. at 754. *Cf. Cape Henry Bird Club v. Laird*, 359 F.Supp. 404, 417 (W.D.Va.1973), aff'd., 484 F.2d 453 (4th Cir. 1973). Any failure to comply with FWCA should be challenged in a suit attacking the adequacy of compliance with NEPA. *See Environmental Defense Fund, Inc. v. Corps of Engineers, supra*, 325 F.Supp. at 754. *Cf. Cape Henry Bird Club v. Laird, supra*, 359 F.Supp. at 418.

Section 2 of NEPA sets forth the congressional purposes of NEPA.[48] Section 101 of NEPA contains a congressional declaration of national environmental policy.[49] Section 102

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[48]Section 2 states:

"The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality." 42 U.S.C. §4321.

[49]Section 101 states:

"(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

"(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may-

"(1) fulfill the responsibilities of each generation as trustee of the environment for suceeding generations;

"(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

"(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undersirable and unintended consequences;

"(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

"(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

"(6) enhance the quality of renewable resources and approach

(footnote continued on following page)

of NEPA establishes a mandatory procedure to compel consideration of and adherence to the newly enacted environmental policy by requiring the completion of an EIS before major federal actions significantly affecting the quality of the human environment can be taken.[50] The EIS is signif-

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the maximum attainable recycling of depletable resources.

"(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." 42 U.S.C. §4331.

[50]Section 102 states:

"The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall-

"(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

"(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by sub-chapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

"(i) the environmental impact of the proposed action.

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

"(iii) alternatives to the proposed action,

"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

"(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the

icant in two major respects. Firstly, it requires federal agencies to review and assess the environmental effects of major actions they propose to undertake.[51] Secondly, it provides a ready source of information and evidence so that the public, Congress, and the courts can review those major federal actions significantly affecting the environment. Whether NEPA also creates substantive rights and whether courts will perform a substantive, as opposed to merely a procedural, review of an EIS is an unresolved question.[52] However, since there is not a final EIS on any aspect of the

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proposal through the existing agency review processes;

"(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

"(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

"(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

"(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

"(H) assist the Council on Environmental Quality established by subchapter II of this chapter." 42 U.S.C. §4332.

[51]See CEQ Guidelines §1500.1(a).

[52]*See Environmental Defense Fund, Inc. v. Corps of Engineers*, 492 F.2d 1123, 1138-1140 (5th Cir. 1974); *Sierra Club v. Froehlke*, 486 F.2d 946, 953 (7th Cir. 1973); *Conservation Council v. Froehlke*, 473 F.2d 664, 665 (4th Cir. 1973); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 470 F.2d 289, 300-301 (8th Cir. 1972), *cert. denied*, 412 U.S. 931, 93 S.Ct. 2749, 37 L.Ed.2d 160 (1973); *National Helium Corp. v. Morton*, 455 F.2d 650, 656 (10th Cir. 1971); *Calvert Cliffs' Coordinating Comm. v. AEC*, 146 U.S.App.D.C. 33, 449 F.2d 1109, 1115 (1971); *Environmental Defense Fund v. TVA*, 371 F.Supp. 1004, 1013 (E.D.Tenn.1973), *aff'd.*, 492 F.2d 466 (6th Cir. 1974); *Conservation Society v. Secretary of Transportation*, 362 F.Supp. 627, 632 (D.Vt.1973) (Oakes, J.), *aff'd.*, 508 F.2d 927 (2d Cir. 1974). *Cf. Daly v. Volpe*, 514 F.2d 1106, 1108-1109 (9th Cir. 1975); *Lathan v. Brinegar*, 506 F.2d 677, 692-693 (9th Cir. 1974) *(en banc)*. *See also Note, The Least Adverse Alternative Approach to Substantive Review Under NEPA*, 88 Harv.L.Rev. 735 (1975); *Note, Substantive Review Under the National Environmental Policy Act: EDF v. Corps of Engineers*, 3 Ecol.L.Q. 173 (1973).

Peripheral Canal project before the Court, judgment is reserved on this question until a later day.

The Court must first determine whether the requirements of Section 102 apply to any of the three facilities which are the subject matter of this controversy.[53] There is no question that the operational effects of each of the three facilities will have significant effects on the environment. All of the parties to this suit are in agreement on this point.[54] The main issue is whether there is major federal action present, thus requiring an EIS.

A. *The Peripheral Canal*

With respect to the Peripheral Canal, major federal action can be derived from one or both of two bases. The first of these bases is participation by the Bureau of Reclamation in the construction, operation, or even planning of the Canal, and the second is the issuance of Sections 9 and 10 permits authorizing the construction and operation of Canal.

1. *Bureau of Reclamation Participation*

If there is federal participation in the construction or operation of the Peripheral Canal, it is clear that either act will constitute major federal action necessitating compliance with NEPA. It is not clear, however, whether there is presently, or in the future will be, such federal participation. At the trial, evidence was adduced with respect to the extent of federal participation in the Peripheral Canal project.

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[53]The Court notes that NEPA does not define the term "major federal actions significantly affecting the environment". The Council on Environmental Quality has, however, promulgated certain guidelines and regulations defining the term "actions", CEQ Guidelines § 1500.5, and identifying major actions significantly affecting the environment, CEQ Guidelines § 1500.6.

[54]In the Agreed Pre-Trial Order, the parties stipulated that the Peripheral Canal was a "'project' having a 'significant effect on the environment'" within the meaning of the California Environmental Quality Act. See Agreed Pre-Trial Order, § 3.44.

In the early 1960's the Bureau of Reclamation was active in formulating development plans for the Peripheral Canal and in fact performed the bulk of this development work until 1968 when the Peripheral Canal Feasibility Report was completed. That report was accompanied by a recommendation from the Commissioner of the Bureau of Reclamation that the Secretary of the Interior adopt the report. Subsequently, on July 3, 1969, an Assistant Secretary of the Interior adopted and approved the report. That report proposed construction of the Peripheral Canal as a joint-use project of the federal and state governments to transfer water across the Delta. It discussed the need for such a facility, the basic engineering requirements, the benefits to be derived from its use, and set out a financial analysis of its cost. Additionally, the Feasibility Report proposed that the cost of the Canal be allocated on a 50-50 basis between the state and federal governments. Although the Feasibility Report has never been submitted to Congress, the Bureau of Reclamation has never given the Department of Water Resources any indication that the federal government would not participate in the financing of the construction of the Peripheral Canal nor has the Bureau of Reclamation withdrawn its recommendation which accompanied the Feasibility Report. Notwithstanding the nonexistence of a formal agreement between the state and federal governments *vis a vis* the construction and use of a Peripheral Canal, there existed a common understanding that the Canal would be a mutual undertaking of both the Department of Water Resources and the Bureau of Reclamation.[55] The personnel of those agencies meet periodically to discuss each other's needs with respect to the Peripheral Canal so that the De-

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[55]The Director of the Department of Water Resources testified that he was proceeding on the assumption that the Peripheral Canal would be a joint-use facility of the state and federal governments.

partment of Water Resources can accommodate federal needs. In the absence of direct federal authorization or funding of the construction of the Peripheral Canal, it is quite possible that the state will enter into a wheeling contract[56] with the federal government, and such a contract could be tantamount to join funding.[57] On the record before the Court, then, it is not possible to determine whether the federal government will participate in either the construction or the operation of the Peripheral Canal.

Even if the Bureau of Reclamation does not participate in the construction and operation of the Canal, its participation in the planning phase may constitute sufficient par-

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[56]A wheeling contract is merely an arrangement whereby the federal government would pay the state charges for use of part of the Canal's capacity to transport federal water.

[57]If there is a wheeling contract, the federal payments thereunder will flow into the State Water Project Funding Account. It is a plausible inference that any federal payments credited to the Funding Account would be used both to service the debt responsible for providing funds to construct the Peripheral Canal and to pay operation and construction expenses of the Canal. A wheeling contract could provide for short-term use of the Peripheral Canal by the Bureau of Reclamation while the federal government developed its own facility or made some alternative arrangements to meet its obligations with respect to supplying federal water to the Central Valley. Such an arrangement would not be equivalent to a joint funding of the Canal. However, if the contract provided for federal use of the Canal which approached the physical life of the Canal, and if the amount of the annual wheeling charge approached an amount representing the sum of those annual operation expenses allocable to federal use of the Canal and that amount necessary to repay the imputed federal share of the Canal's cost assuming an appropriate interest rate and amortization of that share of the cost over a given period of time (*i.e.*, either the physical life of the Canal or the life span of any securities used by the state to finance the Canal), then such a wheeling contract might be equivalent to a joint funding of the Canal. As it has been recognized that lease arrangements are forms of financing, in the instant case a wheeling contract containing certain terms could be a form of financing. Accordingly, if the Bureau of Reclamation withdraws from the project and decides to utilize the Peripheral Canal by means of a wheeling contract, this Court will have to decide whether the terms of that arrangement make it equivalent to a joint funding of the Canal or represent mere short-term use.

ticipation in the project to activate the NEPA requirements of an EIS. It is clear from the trial record that the Bureau of Reclamation is more than a mere neutral observer in the Peripheral Canal project. It was the moving force pushing forward the initial development plans, its recommendation of joint participation in the project was approved by the Secretary of the Interior,[58] and it has expended over $750,000 on the planning of the project. Although this expenditure of money alone may not constitute major federal action in light of the large cost of the entire project, it must be seen in connection with two other factors. As recommendations of this nature move up through the federal bureaucracy, they develop an irreversible momentum and result in the irretrievable commitment of resources, particularly in the form of planning and development funds. Bureaucrats develop vested interests in positions adopted at early stages, and it becomes more likely that an EIS prepared at the end of the bureaucratic chain will be nothing more than a post-hoc rationalization of prior development. *See Jones v. District of Columbia Redevelopment Land Agency*, 162 U.S.App. D.C. 366, 499 F.2d 502, 511 (1974). To allow a federal agency to provide all the impetus for planning and development of a project, to fund a portion of this development process although significantly smaller than the funds expended by the state, and to lobby actively in support of that project, and not to require that agency to file an EIS could result in a subversion of the policies underlying NEPA. In view of the independent ground for an EIS in this case, however, discussed below, and because the Bureau of Reclamation's staff is presently preparing an EIS, the Court need not reach this issue.

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[58]See Plaintiffs' Exhibit 14. On July 3, 1969, Assistant Secretary of the Interior James R. Smith approved and adopted the Bureau's feasibility report on the Peripheral Canal.

2. *The Issuance of Section 9 and 10 Permits*

The Court's holding that the construction and operation of the Peripheral Canal will require the defendants to comply with Sections 9 and 10 of the Rivers and Harbors Act of 1899[59] provides the second basis of major federal action with respect to the Peripheral Canal. The issuance of either a Section 9 or 10 permit pursuant to the Rivers and Harbors Act of 1899 always constitutes major federal action and unless the Corps of Engineers or the Department of the Army makes the negative determination that the issuance has no significant effect on the environment, an EIS is required. See *Davis v. Morton*, 469 F.2d 593, 597-598 (10th Cir. 1972); *Citizens for Clear Air, Inc. v. Corps of Engineers*, 349 F.Supp. 696, 707-708 (S.D.N.Y.1972); *Kalur v. Resor*, 335 F.Supp. 1 (D.D.C.1971). *Cf. Scientists' Inst. for Public Information, Inc. v. AEC*, 156 U.S.App.D.C. 395, 481 F.2d 1079 (1973); CEQ Guidelines § 1500.5. It is irrelevant that the project may be neither federally financed nor constructed under the auspices of a federal agency. The key factor is that without federal approval (*i.e.*, in this case a federal permit) the project could not commence, and thus the federal action (*i.e.*, issuing the permit) has as much effect on the environment as federal funding would have. In *Scientists' Inst. for Public Information, Inc. v. AEC, supra*, 481 F.2d at 1091, the court went so far as to hold that *development of a new technology* by a federal agency which would permit private companies to construct facilities having a significant effect on the environment was by itself major federal action requiring compliance with NEPA's EIS requirement. Thus, before the Corps can issue Section 9 and 10 permits for the Peripheral Canal, an EIS must be filed.

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[59]See p. 632, *supra*.

Since the Corps of Engineers is taking major federal action by issuing the permits, normally it would be required to prepare an EIS. However, here where the Bureau of Reclamation has already begun preparation of an EIS, the Court will not require the Corps to duplicate the efforts of the Bureau of Reclamation as long as the Bureau completes preparation of the EIS, prior to the issuance of Section 9 or 10 permits by the corps.[60] Should the Bureau of Reclamation cease preparation of the EIS, then that obligation would devolve upon the Corps.

B. *The Delta and Tracy Pumping Plants*

With respect to the Delta and Tracy Pumping Plants, it is convenient to distinguish the operation of these facilities up to their present maximum capacities from any future expansion of the two facilities. In regard to the former, plaintiffs vigorously assert that because total annual pumping at both structures will increase in future years to reach their present maximum capacities, these increases alone will

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[60]In *Jones v. District of Columbia Redevelopment Land Agency, supra,* 499 F.2d at 511, the court held that where an urban renewal plan would be passed upon by three different federal agencies, NEPA required all three agencies to prepare an EIS. An EIS is expensive to prepare and to require both the Corps of Engineers and the Bureau of Reclamation to prepare an EIS on the same project would result in a duplication of effort and unnecessary duplicative expenditures of money. Although it could be argued that two EISes would paint a more balanced and objective picture of the environmental impact of the project, it seems unlikely that the incremental increase in objectivity due to the second EIS outweighs the cost of preparation of a second statement. The essence of *Jones* is not that every agency prepare an EIS, but rather that an EIS be prepared at that first point in the decision-making process where there is major input by federal agency. If the Bureau of Reclamation continued to participate in the Peripheral Canal project, then it would clearly be the more appropriate agency to prepare the EIS since it will be the first agency to shape the plans for the Peripheral Canal. In this fashion environmental considerations would enter into and affect the decision-making process at an earlier stage than if the EIS were prepared by the Corps.

be sufficient to require the filing of an EIS. The Court finds this assertion untenable. It is neither supported in logic nor by the case law. Although NEPA is applicable to further incremental major federal actions occurring subsequent to its effective date even though a project was initiated prior to that date, once a project is complete, there can be no further major action because at the time of completion, the project was capable of operating at maximum capacity and the agencies intended to operate it at full capacity. *See generally Morris v. TVA*, 345 F.Supp. 321, 324 (N.D.Ala. 1972). See CEQ Guidelines § 1500.13. If NEPA were construed to require application to ongoing projects which were fully completed prior to January 1, 1970, most federal agencies would become trapped in an endless web of EIS paperwork. Such an interpretation was not intended by Congress and is not supported by the case law.[61]

Nonetheless, an EIS will be required in this case, because both the Tracy and Delta Plants were constructed and are now operated in violation of Section 10 of the Rivers and Harbors Act of 1899 and Section 10 permits must be obtained in order to continue their operations. In considering these applications, the Corps of Engineers and the Department of the Army should consider the advisablity of setting operational limitations on export pumping by the two

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[61]The logic of plaintiffs' position would require all on-going projects to be assessed even though there may be no future major action otherwise to subject those projects to the EIS requirement. Such a result could be argued to be consistent with the objectives of NEPA in that, given the fixed cost of a totally completed project, where the benefits of shutting down the project outweighed all of the costs of the project, the project should be curtailed. However, plaintiffs' position is without support either in NEPA or in the cases construing it.

plants.[62] An agency which violates the law by failing to obtain the necessary permits in accordance with the Rivers and Harbors Act of 1899 proceeds at its own peril and must suffer the consequences of later having to obtain those permits when the standards for their issuance are more stringent. Because these permits will be issued after the effective date of NEPA, the issuing agencies will have to file an EIS prior to issuance, as the issuance of the permits will constitute major federal action significantly affecting the environment. When they comply with NEPA, the federal agencies may take into account the present existence of the Delta and Tracy Plants. In considering operation of those facilities, however, future operational decisions must be shaped so as to minimize adverse environmental consequences, and to the extent practicable they must comply with the EIS procedure. These Section 10 permits must be obtained not to validate the past unlawful construction and operation of these two facilities, but rather to insure that future operation is in accordance with the law.

With respect to any future expansion of the Delta[63] or Tracy [64] plants, an EIS may be required. In the case of the

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[62]It may well be that after consideration of all environmental and other factors, the Corps will want to establish certain periods of the tidal cycle or year when pumping should be curtailed or should be continued at a lower rate. Another possible limitation might be the establishment of an objective test, based upon such factors as the amount of salinity in the Delta waters at various locations, which could be applied on a regular basis and which would set the operational limits.

[63]The Department of Water Resources estimates future water transmission by the State Water Project through the Delta Plant will increase to 1,723,000 acre-feet by 1980, 3,579,000 acre-feet by 1990, and 4,353,000 acre-feet by 2020. The testimony was undisputed that the present maximum pumping capacity of the Delta Plant (6300 cfs) would have to be increased in order for the State to meet contractual obligations. Mr. Teerink, Director of the Department of Water Resources, testified that the present maximum capacity was approximately ⅔ of the future contractual obligation. The present annual maximum pumping capacity of the Delta Plant is 4,599,000 acre-feet. This capacity is inconsistent with Mr. Teerink's testimony and would also seem to be

(footnote continued on following page)

Delta Plant, the state facility, if the Department of Water Resources installs the four additional pumps at the Delta Plant, as is presently planned, that agency will need to obtain a Section 10 permit prior to the commencement of installation and, consequently, the Corps of Engineers will be required to file an EIS if it determines that the expansion in capacity will have a significant effect on the environment. It will be no defense that the original project was initiated and completed prior to January 1, 1970, as any future expansion of pumping facilities and issuance of a Section 10 permit with respect thereto will constitute either future incremental major action of an ongoing project or new major federal action and may require an EIS before the agencies can proceed. See *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275, 1282-1283 (9th Cir. 1973); *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323, 1331 (4th Cir. 1972); *Keith v. Volpe*, 352 F.Supp. 1324, 1332 (C.D.Cal.1972), *aff'd. sub nom. Keith v. California Highway Commission*, 506 F.2d 696 (9th Cir. 1974); *Morningside-Lenox Park Ass'n v. Volpe*, 334 F.Supp. 132, 144 (N.D.Ga.1971). No exemption from NEPA's requirements arises even if it were impractical to reassess the basic course of action of the original project. See *Jicarilla Apache Tribe of Indians v. Morton, supra*, 471 F.2d at 1282-1283. The

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inconsistent with any need to add four additional pumps to the Delta Plant in view of the Department's estimates of future water transmissions by the State Water Project.

[64]The rate of export pumping of Delta waters by the Tracy and Delta Plants will increase from 3,388,000 acre-feet to approximately 7,000,000 acre-feet in 1990, and approximately 7,750,000 acre-feet by 2020. The figure for 1990 assumes the completion of all related federal and state projects, including the Peripheral Canal. It is expected that by 2020, the federal government will be exporting 4,087,000 acre-feet per annum through the Tracy Plant. In order to double approximately the federal export rate, either the Tracy Plant would have to be enlarged or a supplemental pumping facility would have to be constructed, as the present maximum capacity of the Tracy Plant is only 3,400,000 acre-feet per annum if all six units are available 365 days a year.

agency required to file the EIS must still act so as to minimize any adverse environmental consequences of remaining portions of the project "to the maximum extent practicable". Where part of a project subject to the NEPA requirements has been constructed prior to the effective date of NEPA, then the cost of activity completed prior to the NEPA effective date is merely one additional factor to be weighed in applying cost-benefit analysis to determine the course of future incremental major actions subject to NEPA. Thus, in the case of a project where all major federal action is post-NEPA, an EIS is required to the *fullest extent possible*, while where some major federal action occurred pre-NEPA, an EIS is required to the *maximum extent practicable* as to major federal actions taken after January 1, 1970. *See Jicarilla Apache Tribe of Indians v. Morton, supra*, 471 F.2d at 1282-1283; *Environmental Law Fund v. Volpe*, 340 F.Supp. 1328, 1332 (N.D.Cal.1972).

In the case of the Tracy Plant, the federal facility, if the Bureau of Reclamation attempts to expand its pumping capacity, both the expansion itself and the issuance of a Section 10 permit authorizing that expansion will require an EIS.[65]

C. *Timing of the EIS*

Finally, the timing of any required EIS for the three structures considered here merits some mention. Any EIS

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[65]Here the expansion of the capacity at the Tracy Plant would constitute major federal action and the responsible federal official would be associated with the Bureau of Reclamation. The action of the Secretary of the Army (or the Corps) with respect to the issuance of the Section 10 permit would not require him to prepare an EIS since its scope would be identical to that prepared by the Bureau of Reclamation. See p. 645, *supra*. In contrast the major federal action involved with the expansion of the capacity of the Delta Plant would be the issuance of the Section 10 permit and the responsible federal official, the Secretary of the Army (or the Corps), would have to prepare an EIS.

which is required because of the issuance of Section 9 and 10 permits should be drafted and completed well in advance of the commencement of the Corps' decision-making process. See *Greene County Planning Board v. FPC, supra,* 455 F.2d at 421-422. Although we do not set forth explicit requirements with respect to the timing of the EIS by the instant agencies, they should be guided by the statement of the court in *Jones v. District of Columbia Redevelopment Land Agency, supra,* that EISes

> "were not to be merely *post hoc* environmental rationalizations of decisions already fully and finally made. Rather their purpose is to ensure 'meaningful consideration of environmental factors at all stages of agency decision making,' and to inform both the public and agencies implicated at subsequent stages of decision-making of environmental costs of the proposal." 499 F.2d at 511.

This statement also applies to the timing of any EIS that must be filed on the part of the Bureau of Reclamation due to its participation in the Peripheral Canal project. It is clear beyond cavil that an EIS would be required considerably prior to the first day of construction activity.[66] *Cf. Envi-*

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[66]At the outset of the trial, and in the initial briefs and memoranda filed with this Court, defendants asserted that the law imposed no duties presently as to the Peripheral Canal because its construction was not imminent. It was even contended that the likelihood of its being constructed at all was highly speculative. During trial, however, the parties abandoned that position, as the evidence proved that not only was the construction of the Canal imminent but that many activities certainly preparatory to the construction (if not construction itself) had been going on for some time. The Director of Water Resources, Mr. Teerink, stated that the state would build the Canal and was planning to commence construction late in 1975. He estimated completion by 1980. In order to meet that schedule, preconstruction activity (*e. g.*, right of way work, engineering studies) was presently underway.

The Department of Water Resources has officially adopted the Peripheral Canal as the Delta water facility of the State Water Project. Development and planning of the Peripheral Canal began at some point

ronmental Law Fund v. Volpe, supra, 340 F.Supp. at 1332-1333; *Morningside-Lenox Park Ass'n v. Volpe, supra,* 334 F.Supp. at 142-144.

V. CALIFORNIA ENVIRONMENTAL QUALITY ACT

Plaintiffs' sixth claim for relief alleges that the construction of the proposed Peripheral Canal, the proposed future increases in the volume of water to be pumped through the Delta and Tracy Plants, and the proposed modifications to the Delta Plant necessary to accommodate such increases will violate the California Environmental Quality Act

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prior to 1965 and proceeded up to the date of the trial. This development work included the acquisition of land as a portion of the right of way, the initial design work, and commencement of the final design work including the preparation of contract drawings and construction specifications. In this connection, the state had expended through 1973 in excess of $6,627,000 on planning and development and in excess of $2,275,000 in connection with right-of-way acquisitions and the purchase of land. Furthermore, the federal government had spent over $750,000 through March 31, 1974, on activities associated with the planning of the Canal. At present the Department of Water Resources has approximately 45-50 people involved with the design group working on the plans for the Canal. Finally, on January 18, 1968, the California Department of Public Works Division of Highways and the Department of Water Resources executed an agreement whereby the Department of Public Works would advance $2,000,000 to the Department of Water Resources so that it could acquire right of way for four segments of the Peripheral Canal sufficient to provide up to 7,000,000 cubic yards of borrow material from the canal prism. Pursuant to this agreement, contractors' bidding on the construction of Interstate 5 (I-5) would then be required to use those portions of the Peripheral Canal right of way as a mandatory borrow site for highway fill. The purpose of this agreement was to coordinate the construction of I-5 and the Peripheral Canal. Although I-5 bids were received in December of 1973, none had been accepted as of the date of the trial.

In *Friends of Earth v. Coleman,* 513 F.2d 295, 300 (9th Cir. 1975), the court held that the proposed I-5 excavations out of the proposed Peripheral Canal right of way would not constitute a commencement of the Canal project sufficiently significant to warrant formal NEPA evaluation of the Canal's environmental impact. The court did state that "an EIS will be required before any work on the canal beyond highway fill excavations can be done." *Ibid.* at 300.

(CEQA),[67] unless adequate environmental impact reports (EIR) are first prepared by the responsible state agency.[68]

Sections 21000 and 21001 of CEQA contain a declaration of California's general environmental policy. Section 21100 requires that state agencies prepare an environmental impact report on any project they propose to carry out or approve which may have a significant effect on the environment.[69]

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[67]California Public Resources Code, § 21000 *et seq.*

[68]State defendants' assertion that the CEQA claim is barred by Section 21167(a) is without merit. That section provides:

"Any action or proceeding to attack, review, set aside, void, or annul the following acts or decisions of a public agency on the grounds of noncompliance with this division shall be commenced as follows:

"(a) An action or proceeding alleging that a public agency is carrying out or has approved a project which may have a significant effect on the environment without having determined whether the project may have a significant effect on the environment shall be commenced within 180 days of the public agency's decision to carry out or approve the project, or, if a project is undertaken without a formal decision by the public agency, within 180 days after commencement of the project." The amendment adding the CEQA claim related back to the filing of the complaint as the CEQA claim arose out of the same transaction and involves the same defendants. Fed.R.Civ.P. 15(c).

[69]Section 21100 provides:

"All state agencies, boards, and commissions shall prepare, or cause to be prepared by contract, and certify the completion of an environmental impact report on any project they propose to carry out or approve which may have a significant effect on the environment. Such a report shall include a detailed statement setting forth the following:

"(a) The environmental impact of the proposed action.

"(b) Any adverse environmental effects which cannot be avoided if the proposal is implemented.

"(c) Mitigation measures proposed to minimize the impact including, but not limited to, measures to reduce wasteful, inefficient, and unnecessary consumption of energy.

"(d) Alternatives to the proposed action.

"(e) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.

"(f) Any irreversible environmental changes which would be involved in the proposed action should it be implemented.

"(g) The growth-inducing impact of the proposed action."

"Project" is defined in Section 21065.[70] Section 15081 of the CEQA regulations sets forth the factors to be weighed by an agency to determine whether a particular project is such that it "may have a significant effect on the environment".[71]

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[70]Section 21065 provides:

" 'Project' means the following:

"(a) Activities directly undertaken by any public agency.

"(b) Activities undertaken by a person which are supported in whole or in part through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.

"(c) Activities involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies."

[71]Section 15081 provides in pertinent part:

"(a) The determination of whether a project may have a significant effect on the environment calls for careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data. An iron clad definition of significant effect is not possible because the significance of an activity may vary with the setting. For example, an activity which may not be significant in an urban area may be significant in a rural area. There may be a difference of opinion on whether a particular effect should be considered adverse or beneficial, but where there is, or anticipated to be a substantial body of opinion that considers or will consider the effect to be adverse, the lead agency should prepare an EIR to explore the environmental effects involved.

"(b) In evaluating the significance of the environmental effect of a project, the lead agency shall consider both primary or direct and secondary or indirect consequences. Primary consequences are immediately related to the project (the construction of a new treatment plant may facilitate population growth in a particular area), while secondary consequences are related more to primary consequences than to the project itself (an impact upon the resource base, including land, air, water and energy use of the area in question may result from the population growth).

"(c) Some examples of consequences which may have a significant effect on the environment in connection with most projects where they occur, include a change that:

"(1) Is in conflict with environmental plans and goals that have been adopted by the community where the project is to be located;

"(2) Has a substantial and demonstrable negative aesthetic effect;

"(3) Substantially affects a rare or endangered species of animal or plant, or habitat of such a species;

(footnote continued on following page)

The California Supreme Court has noted the similarity of CEQA and NEPA and stated that interpretations of NEPA are relevant in construing similar terms in CEQA. *Friends of Mammoth v. Board of Supervisors of Mono County*, 8 Cal.3d 247, 104 Cal.Rptr. 761, 502 P.2d 1049, 1058 (1972). One federal court has held that CEQA was deliberately modeled after NEPA and that therefore the same considerations govern the applicability of the two acts to the same projects. *Keith v. Volpe, supra*, 352 F.Supp. at 1337. Accordingly, most of the principles discussed *supra* with regard to NEPA are applicable to our consideration of the duties imposed upon defendants with respect to CEQA.

In the Agreed Pre-Trial Order the defendants stipulated that the Peripheral Canal was a project which may have a significant effect on the environment.[72] In fact, the state defendants issued a draft Environmental Impact Report on the Peripheral Canal project in August of 1974. That draft is being circulated for comments and criticism, and then a final Environmental Impact Report will be prepared. In view of the imminence of this report the Court will offer only a few observations.

At present no Environmental Impact Report is required with respect to the Delta Plant as that facility was completed

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"(4) Causes substantial interference with the movement of any resident or migratory fish or wildlife species;

"(5) Breaches any published national, state, or local standards relating to solid waste or litter control;

"(6) Results in a substantial detrimental effect on air or water quality, or on ambient noise levels for adjoining areas;

"(7) Involves the possibility of contaminating a public water supply system or adversely affecting ground water;

"(8) Could cause substantial flooding, erosion or siltation;

"(9) Could expose people or structure to major geologic hazards." 14 Cal.Admin. Code, § 15081.

[72]See Agreed Pre-Trial Order, § 3.44.

prior to the effective date of CEQA. Before expanding that facility by installing additional pumps, however, the state defendants will have to comply with CEQA.[73] There is no merit to plaintiffs' contention that increased pumping by the presently existing facility requires compliance with CEQA. Plaintiffs' reliance on *County of Inyo v. Yorty*, 32 Cal.App.3d 795, 108 Cal.Rptr. 377 (1973), is misplaced as in that case there was construction of additional pumping and extraction facilities in addition to expanded pumping at presently existing facilities. Finally, no Environmental Impact Report will be required for the Tracy Plant since that is a federal facility and thus not subject to CEQA.

The foregoing constitutes the Court's Findings of Fact and Conclusions of Law as required by Rule 52(a) Federal Rules of Civil Procedure.

It is hereby ordered that the state defendants shall obtain authorization to operate the Delta Pumping Plant in the manner prescribed in Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, by the date established by

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[73]See 14 Cal.Admin.Code, § 15070, which provides in pertinent part:

"(a) A project as defined in Section 15037 (a) (1) of these Guidelines, approved prior to November 23, 1970, shall require an Environmental Impact Report or a Negative Declaration if the project may have a significant effect on the environment, and either of the following conditions exists:

> "(1) A substantial portion of public funds allocated for the project have not been spent and it is still feasible to modify the project to mitigate potentially adverse environmental effects, or to choose feasible alternatives to the project, including the alternative of 'no project' or halting the project; provided that this Section (1) shall not apply to projects which come under the jurisdiction of the National Environmental Policy Act (NEPA) and which, through regulations promulgated under NEPA, were held to be too far advanced at the time of NEPA's effective date to require an EIS in compliance with those regulations.
>
> "(2) A public agency proposes to modify the project in such a way that the project might have a new significant effect on the environment."

this Court at the hearing to be held on September 4, 1975, as more fully set forth below.

It is hereby further ordered that the federal defendants shall obtain authorization to operate the Tracy Pumping Plant in the manner prescribed in Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, by the date established by this Court at the hearing to be held on September 4, 1975, as more fully set forth below.

It is hereby further ordered that the Secretary of the Army or his delegate shall prepare and file an Environmental Impact Statement pursuant to 42 U.S.C. § 4332 with respect to issuance of any Section 10 permits authorizing the operation of the Tracy Pumping Plant and the Delta Pumping Plant prior to the issuance of any such permits.[74]

It is hereby further ordered that all parties shall appear before this Court at 1:30 P.M. on September 4, 1975, in order to determine a date by which the state and federal defendants must obtain authorization of the operation of the Tracy and Delta Pumping Plants under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403.

It is hereby further ordered that with respect to the Peripheral Canal, as presently proposed, no construction work shall begin prior to the receipt of authorization under Sections 9 and 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401, 403, and that no Section 9 or 10 permits may be issued with respect to the Peripheral Canal, as presently proposed, without the prior preparation and filing of an Environmental Impact Statement by the Secretary of the

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[74]Nothing in this order shall be construed to prohibit the federal defendants from preparing and filing one document to serve as an Environmental Impact Statement for the Tracy Pumping Plant, the Delta Pumping Plant, and the Peripheral Canal as long as any such document meets the requirements of 42 U.S.C. § 4332, and as long as legally imposed deadlines are met.

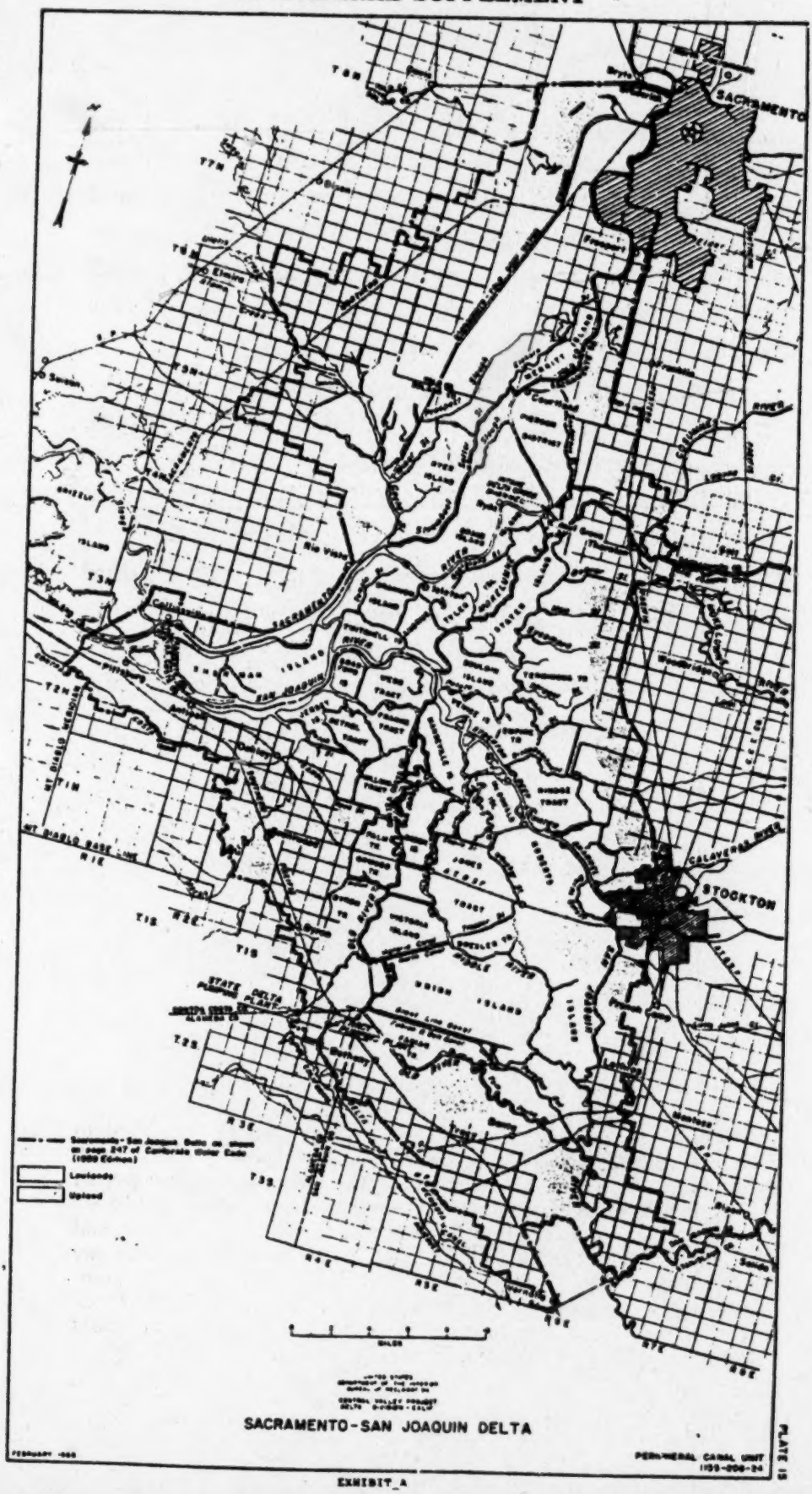
Army or his delegate pursuant to 42 U.S.C. § 4332. If the Bureau of Reclamation completes preparation of an Environmental Impact Statement with respect to the Peripheral Canal, then that report may be filed in lieu of the Environmental Impact Statement required by this order with respect to the Canal and that filing will obviate the need for such a filing by the Secretary of the Army.

It is hereby further ordered that with respect to the Peripheral Canal, as presently proposed, no construction work shall commence until the Department of Water Resources prepares and files an Environmental Impact Report pursuant to California Public Resources Code § 21100.[75]

It is hereby further ordered that plaintiffs' second, third and fifth claims are dismissed with prejudice.

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[75]Nothing in this Memorandum of Opinion shall be construed to prohibit the defendants from preparing one document to serve as both the Environmental Impact Statement and Environmental Impact Report as long as that one document meets the requirements of both 42 U.S.C. § 4332 and California Public Resources Code § 21100. Nor should anything in this Memorandum of Opinion be construed to preclude any consolidation of the work effort on the part of defendants in the preparation of the necessary Environmental Impact Statement and Environmental Impact Report to the extent that such a consolidation would result in avoidance of repetitious work by defendants.



SACRAMENTO-SAN JOAQUIN DELTA

PERIPHERAL CANAL UNIT

PLATE 15

EXHIBIT A

APPENDIX 4.

Provisions of Federal Statutes Recognizing State Law as Governing Water Rights.

* * * * *

1. Section 9 of the Act of July 26, 1866 (14 Stat. 253, 30 U.S.C.A. § 51 (1971), 43 U.S.C.A. § 661 (1964)):

   "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decision of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right-of-way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

2. Section 17 of the Act of July 9, 1870 (16 Stat. 218, 30 U.S.C.A. § 52 (1971), 43 U.S.C.A. § 661 (1964)):

   "All patents granted, or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by section 51 of this title."

3. Section 1 of the Desert Land Act of March 3, 1877 (19 Stat. 377, as amended, 43 U.S.C.A. § 321 (1964)):

   "It shall be lawful for any citizen of the United States, or any person of requisite age 'who may be entitled to become a citizen, and who has filed his declaration to

become such' and upon payment of 25 cents per acre — to file a declaration under oath with the officer designated by the Secretary of the Interior of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one-half section, by conducting water upon the same, within the period of three years thereafter: *Provided, however,* That the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights. . . ."

4. Section 18 of the Act of March 3, 1891 (26 Stat. 1101, as amended, 43 U.S.C.A. § 946 (1964)):

"The right of way through the public lands and reservations of the United States is hereby granted to any canal ditch company, irrigation or drainage district formed for the purpose of irrigation or drainage, and duly organized under the laws of any State or Territory . . . *Provided,* That . . . the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories."

5. Act of February 26, 1897 (29 Stat. 599, 43 U.S.C.A. § 664 (1964)):

"All reservoir sites reserved or to be reserved shall be open to use and occupation under [The Act of March 3, 1891 granting rights of way for reservoirs and canals] and any State is hereby authorized to improve and occupy such reservoir sites to the same extent as an individual or private corporation, under such rules and regulations as the Secretary of the Interior may prescribe: *Provided,* That the charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this section shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate."

6. Section 1 of the Act of June 4, 1897 (30 Stat. 36, 16 U.S.C.A. § 481 (1964)):

"All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder."

*7. Section 8 of the Reclamation Act of June 17, 1902 (32 Stat. 390, 43 U.S.C.A. § 372, 383 (1952)):

"Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing herein shall in any way effect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or

the waters thereof. *Provided,* That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right."

8. Section 4 of the Act of February 1, 1905 (33 Stat. 623, 16 U.S.C.A. § 524 (1974)):

"Rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the national forests of the United States, are granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said forests are respectively situated."

*9. Section 2 of the Warren Act of February 21, 1911 (36 Stat. 926, 43 U.S.C.A. § 524 (1964)):

"In carrying out the provisions of said reclamation act and acts amendatory thereof or supplementary thereto, the Secretary of the Interior is authorized, upon such terms as may be agreed upon, to cooperate with irrigation districts, water-users' associations, corporations, entrymen, or water users for the construction or use of such reservoirs, canals, or ditches as may be advantageously used by the Government and irrigation districts, water-users' associations, corporations, entrymen, or water users for impounding, delivering, and carrying water for irrigation purposes: . . . *Provided,* That nothing contained in this act shall be held or construed as enlarging or attempting to

enlarge the right of the United States, under existing law, to control the waters of any stream in any State."

10. Section 11 of the Act of December 19, 1913 (relating to Hetch-Hetchy), granting to the City and County of San Francisco certain rights-of-way over public lands and lands in Yosemite National Park and Stanislaus National Forest for the construction of works to bring water and power to San Francisco for domestic purposes and uses (38 Stat. 250):

"That this Act is a grant upon certain express conditions specifically set forth herein, and nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the State of California relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with the laws of said State."

11. Sections 9(b) and 27 of the Federal Power Act of June 10, 1920:

"9. Each applicant for a license under this act shall submit to the Commission —

. . . .

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this act." (41 Stat.

1068, 16 U.S.C.A. § 802(b)(1964)).

"27. Nothing contained in this act shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." (41 Stat. 1077, 16 U.S.C.A. § 821 (1952)).

*12. Section 18 of the Boulder Canyon Project Act of December 21, 1928 (45 Stat. 1065, 43 U.S.C.A. § 617 q (1964)):

"Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement."

13. Section 3 of the Taylor Grazing Act of June 28, 1934 (43 Stat. 1270, as amended, 43 U.S.C.A. § 315b (1964)):

". . . *Provided further*, That nothing in this chapter shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacture, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law. . . ."

14. Section 4 of the Act of August 28, 1937 (50 Stat. 870, 16 U.S.C.A. §590(u) (1952); Repealed Aug 8, 1961, Pl 87-128, when subject matter was transferred to chapter 50 of title 7):

"As a condition to extending benefits under sections 590r-590x of this title to any lands not owned or controlled by the United States or any of its agencies, the Secretary of Agriculture may, insofar as he may deem necessary for the purposes of sections 590v-590x of this title, require —

"(1) The enactment of State and local laws providing for soil conserving land uses and practices, and the storage, conservation and equitable utilization of waters;

"(2) Agreements or covenants in regard to the maintenance and permanent use of such water, facilities or lands benefited by such facilities;

"(3) Contributions in money, services, materials, or otherwise to any operations conferring such benefits."

15. Section 3 of the Water Conservation Act of August 11, 1939 (53 Stat. 1419, as amended, 16 U.S.C.A. § 590z-1(b) (2) (1974)):

"No actual construction of the physical features of a project shall be undertaken unless and until . . . .;

"(2) the Secretary has found (i) that water rights adequate for the purposes of the project have been acquired with titles and at prices satisfactory to him, or that such water rights have been initiated and in his judgment can be perfected in conformity with State law and any applicable interstate agreements and in a manner satisfactory to him; and (ii) that such water rights can be utilized for the purposes of the project in conformity with State law and any applicable interstate agreements and in a manner satisfactory to him."

*16. Section 14 of the Boulder Canyon Project Adjustment Act of July 19, 1940 (54 Stat. 779, 43 U.S.C.A. § 618m (1964)):

"Nothing in this act shall be construed as interfering with such rights as the States had on July 19, 1940, either to the waters within their borders or to adopt such policies and enact such laws as they deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement. . . ."

17. Section 1 of the Flood Control Act of December 22, 1944 (58 Stat. 887, 33 U.S.C.A. § 701-1 (1970)):

"(a) . . . The Chief of Engineers shall transmit a copy of his proposed report to each affected State, and, in case the plans or proposals covered by the report are concerned with the use or control of waters which rise in whole or in part west of the ninety-seventh meridian, to the Secretary of the Interior. Within ninety days from the date of receipt of said proposed report, the written views and recommendations of each affected State and of the Secretary of the Interior may be submitted to the Chief of Engineers. The Secretary of the Army shall transmit to the Congress, with such comments and recommendations as he deems appropriate, the proposed report together with the submitted views and recommendations of affected States and of the Secretary of the Interior. The Secretary of the Army may prepare and make said transmittal any time following said ninety-day period. The letter of transmittal and its attachments shall be printed as a House or Senate document.

"(b) The use for navigation, in connection with the operation and maintenance of such works herein au-

thorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

"(c) The Secretary of the Interior, in making investigations of and reports on works for irrigation and purposes incidental thereto shall, in relation to an affected State or States (as defined in paragraph (a) of this section), and to the Secretary of the Army, be subject to the same provisions regarding investigations, plans, proposals, and reports as prescribed in paragraph (a) of this section for the Chief of Engineers and the Secretary of the Army. In the event a submission of views and recommendations, made by an affected State or by the Secretary of the Army pursuant to said provisions, sets forth objections to the plans or proposals covered by the report of the Secretary of the Interior, the proposed works shall not be deemed authorized except upon approval by an Act of Congress; and subsection 9(a) of the Reclamation Project Act of 1939 [cite] and subsection 3(a) of the Act of August 11, 1939 [cite], as amended, are hereby amended accordingly."

18. Reservation (c) to the Mexican Water Treaty, U.S. Treaty Ser. No. 994 (59 Stat. 1219 (1945)):

"That nothing contained in the treaty or protocol shall be construed as authorizing the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, or the United States Section of said Commission, directly or indirectly to alter or con-

trol the distribution of water to users within the territorial limits of any of the individual States."

19. The National Parks Act of August 7, 1946 (60 Stat. 885, 16 U.S.C.A. § 17j-2 (1974)):

"Appropriations for the National Park Service are authorized for: . . .

"(g) Investigation and establishment of water rights in accordance with local custom, laws, and decisions of courts, including the acquisition of water rights or of lands or interests in lands or rights-of-way for use and protection of water rights necessary or beneficial in the administration and public use of the national parks and monuments."

20. Section 208 of the Act of July 10, 1952, authorizing suits against the United States in State courts for the adjudication of water rights (66 Stat. 560, 43 U.S.C.A. § 666(a) and (c) (1964)):

"(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent

as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit."

. . . .

"(c) Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream."

21. Subsection 3(e) of the Submerged Lands Act of May 22, 1953 (67 Stat. 30, 43 U.S.C.A. § 1311(e) (1964)):

"Nothing in this act shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian, relating to the ownership and control of ground and surface waters; and the control, appropriation, use, and distribution of such waters shall continue to be in accordance with the laws of such States."

*22. Subsections 2(a) and 3(c) of the Act of July 28, 1954, to authorize the Secretary of the Interior to construct facilities for the Santa Margarita River Project, California (68 Stat. 547):

Sec. 2 (a) "In the interest of comity between the United States of America and the State of California and consistent with the historic policy of the United States of America of Federal noninterference with State water law, the Secretary of the Navy shall promptly comply with the procedures for the acquisition of appropriative water rights required under the laws of the State of California as soon as he is satisfied, with the advice of the Attorney General of the United

States, that such action will not adversely affect the rights of the United States of America under the laws of the State of California."

Sec. 3 (c) "For the purposes of this Act the basis, measure, and limit of all rights of the United States of America pertaining to the use of water shall be the laws of the State of California: *Provided,* That nothing in this Act shall be construed as a grant or a relinquishment by the United States of America of any of its rights to the use of water which it acquired according to the laws of the State of California: either as a result of its acquisition of the lands comprising Camp Joseph H. Pendleton and adjoining naval installations, and the rights to the use of water as a part of said acquisition, or through actual use or prescription or both since the date of that acquisition, if any, or to create any legal obligation to store any water in De Luz Reservoir, to the use of which it has such rights, or to require the division under this Act of water to which it has such rights."

23. Section 4(4) of the Act of August 4, 1954 (68 Stat. 667, as amended, 16 U.S.C.A. 1004(4) (1974)) relating to Watershed Protection and Flood Prevention:

"The Secretary shall require as a condition to providing Federal assistance for the installation of works of improvement that local organizations shall —

. . .

"(4) acquire, or provide assurance that landowners or water users have acquired, such water rights, pursuant to State law, as may be needed in the installation and operation of the work of improvement;"

24. Section 4(b) of the Act of July 23, 1955, providing for multiple use of the surface of tracts of public land

(69 Stat. 368, 30 U.S.C.A. § 612(b) (1971)):

". . . *Provided further,* That nothing in this act shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim."

*25. Section 7 of the Colorado River Storage Project Act of April 11, 1956 (70 Stat. 109, 43 U.S.C.A. § 620f (1964)):

". . . Subject to the provisions of the Colorado River Compact, neither the impounding nor the use of water for the generation of power and energy at the plants of the Colorado River storage project shall preclude or impair the appropriation of water for domestic or agricultural purposes pursuant to applicable state law."

*26. Section 4 of the Act of July 2, 1956, relating to the administration of Section 9, subsections (d) and (e) of the Reclamation Act of 1939 (70 Stat. 484, 43 U.S.C.A. § 485h-4 (1964)):

"Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,*

That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right."

*27. Section 4(b) of the Small Reclamation Projects Act of August 6, 1956 (70 Stat. 1044, 43 U.S.C.A. § 422d (1964)):

"(b) Every such proposal shall include a showing that the organization already holds or can acquire all lands and interests in land (except public and other lands and interests in land owned by the United States which are within the administrative jurisdiction of the Secretary and subject to disposition by him) and rights, pursuant to applicable State law, to the use of water necessary for the successful construction, operation, and maintenance of the project and that it is ready, able, and willing to finance otherwise than by loan and grant under this Act such portion of the cost of construction (which portion shall include all costs of acquiring lands, interests in land, and rights to the use of water) as the Secretary shall have advised is proper in the circumstances: . . . ."

28. Section 202 of the Act of August 28, 1958, setting up a United States Study Commission to formulate a comprehensive plan for the development of certain Texas river basins. (72 Stat. 1058, Public Law 85-843):

"Sec. 202. In carrying out the purposes of this title it shall be the policy of Congress to —

"(1) recognize and protect the rights and interests of the State of Texas in determining the development of the watersheds of the rivers herein mentioned and its interests and rights in water utilization and control,

as well as the preservation and protection of established uses; . . . ."

29. Section 301(a) of the Act of July 3, 1958, relating to the development of water supplies for domestic, municipal, industrial and other purposes (72 Stat. 319; Public Law 85-500, 43 U.S.C.A. § 390b (1964)):

"It is hereby declared to be the policy of the Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes and that the Federal Government should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects."

*30. Section 5(e) of the Act of August 16, 1962, authorizing the construction, operation and maintenance by the Secretary of the Interior of the Fryingpan-Arkansas Project, Colorado (76 Stat. 392, Public Law 87-590, 43 U.S.C.A. § 616d (1964)):

"In the operation and maintenance of all facilities under the jurisdiction and supervision of the Secretary of the Interior authorized by this Act, the Secretary of the Interior is directed to comply with the applicable provisions of the Colorado River compact, the Upper Colorado River Basin compact, the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act, the Colorado River Storage Project Act (and any contract lawfully entered into by the United States under any of said Acts), the treaty with the United Mexican States, and the operating principles, and to comply with the laws of the State of Colorado relating to the control, appropriation, use, and distribution of

water therein. In the event of the failure of the Secretary of the Interior to so comply, any State of the Colorado River Basin may maintain any action in the Supreme Court of the United States to enforce the provisions of this section and consent is given to the joinder of the United States as a party in such suit or suits, as a defendant or otherwise."

31. Sections 2 and 3 of the Act of July 22, 1965, providing for the optimum development of the Nation's water and related land resources (79 Stat. 244, Public Law 89-80, 42 U.S.C.A. §§ 1962, 1962-1 (1974)):

"Sec. 2. In order to meet the rapidly expanding demands for water throughout the Nation, it is hereby declared to be the policy of the Congress to encourage the conservation, development, and utilization of water and related land resources of the United States on a comprehensive and coordinated basis by the Federal Government, States, localities, and private enterprise with the cooperation of all affected Federal agencies, States, local governments, individuals, corporations, business enterprises, and others concerned."

"Sec. 3. Nothing in this Act shall be construed —

(a) to expand or diminish either Federal or State jurisdiction, responsibility, or rights in the field of water resources planning, development, or control; nor to displace, supersede, limit or modify any interstate compact or the jurisdiction or responsibility of any legally established joint or common agency of two or more States, or of two or more States and the Federal Government; nor to limit the authority of Congress to authorize and fund projects."

*32. Section 4 of the Act of September 2, 1965, authorizing the Secretary of the Interior to construct, operate, and maintain the Auburn-Folsom South unit, American River division, Central Valley Project under Federal reclamation laws (79 Stat. 618, Public Law 89-161, 43 U.S.C.A. § 616 ddd (1976 Supp.)):

"In locating and designing the works and facilities authorized for construction by this Act, and in acquiring or withdrawing any lands as authorized by this Act, the Secretary shall give due consideration to the reports upon the California water plan prepared by the State of California, and shall consult the local interests who may be affected by the construction and operation of said works and facilities or by the acquisition or withdrawal of lands, through public hearings or in such manner as in his discretion may be found best suited to a maximum expression of the views of such local interests."

*33. Section 6 of the Act of October 22, 1965, authorizing the Secretary of the Interior to construct, operate, and maintain the Southern Nevada Water Project, Nevada, and for other purposes (79 Stat. 1069, Public Law 89-292, 43 U.S.C.A. § 616 lll (1976 Supp.)):

"In all water supply contracts for the use of water in Nevada under this Act or section 5 of the Boulder Canyon Project Act (45 Stat. 1057) the Secretary shall recognize the intrastate priorites of water rights to the use of water existing on the date of enactment of this Act: Provided, however, That nothing in this Act shall be construed as validating any right diminished or lost because of abandonment, nonuse, or lack of due diligence, nor shall anything in this Act be construed as affecting the satisfaction of present perfected rights as defined by the decree of the United States Supreme

Court in Arizona against California et al. (376 U.S. 340)."

34. Section III of the Act of December 31, 1970, authorizing the construction, repair and preservation of certain public works on rivers and harbors for navigation, flood control, and for other purposes (84 Stat. 1821, Public Law 91-611, 33 U.S.C.A. § 595a (1979 Supp.)):

"In all cases where real property shall be taken by the United States for the public use in connection with any improvement of rivers, harbors, canals, or waterways of the United States, and in all condemnation proceedings by the United States to acquire lands or easements for such improvements, the compensation to be paid for real property taken by the United States above the normal high water mark of navigable waters of the United States shall be the fair market value of such real property based upon all uses to which such real property may reasonably be put, including its highest and best use, any of which uses may be dependent upon access to or utilization of such navigable waters. . . ."

35. Section 6(f) of the Act of July 29, 1971, expanding and extending the desalting program being conducted by the Secretary of the Interior, and for other purposes (85 Stat. 161, Public Law 92-60, 42 U.S.C.A. § 1959d (f) (1974)):

"Nothing in this Act shall be construed to alter existing law with respect to the ownership and control of water."

36. The Act of October 18, 1972 to amend the Federal Water Pollution Control Act (86 Stat. 816, Public Law 92-500, 33 U.S.C.A. §§ 1251 (b), 1370 (1976 Supp.)):

"Sec. 101(b). It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution."

"Sec. 510. Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."

*37. Section 207 of the Act of 1974, authorizing the construction, operation, and maintenance of certain works in the Colorado River Basin to control the salinity of water delivered to users in the United States and Mexico. (88 Stat. 274, Public Law 93-320, 43 U.S.C.A. § 1597 (1979 Supp.)):

"Except as provided in sections 205(b) and 205(d) of this title, with respect to the Colorado River Basin Project Act and the Colorado River Storage Project Act, respectively, nothing in this title shall be construed to alter, amend, repeal, modify, interpret, or be in conflict with the provisions of the Colorado River Compact (45 Stat. 1057), the Upper Colorado River Basin Compact (63 Stat. 31), the Water Treaty of 1944 with the United Mexican States (Treaty Series 994; 59 Stat. 1219), the decree entered by the Supreme Court of the United States in Arizona against California and others (376 U.S. 340), the Boulder Canyon Project Act (45 Stat. 1057), Boulder Canyon Project Adjustment Act (54 Stat. 774; 43 U.S.C. 618a), section 15 of the Colorado River Storage Project Act (70 Stat. 111; 43 U.S.C. 620n), the Colorado River Basin Project Act (82 Stat. 885), section 6 of the Fryingpan-Arkansas Project Act (76 Stat. 393), section 15 of the Navajo Indian irrigation project and initial stage of the San Juan Chama Project Act (76 Stat. 102), the National Environmental Policy Act of 1969, and the Federal Water Pollution Control Act, as amended."

38. Section 101(g) of the Federal Clean Water Act, stating Congressional declaration of goals and policy (91 Stat. 1567; Public Law 95-217, § 5(a); 33 USCA § 1251(g) (1978)):

"It is the policy of Congress that the authority of each State to allocate quantities of water within its

jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.''

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-1502

KERN COUNTY WATER AGENCY, et al.

Petitioners,

vs.

SIERRA CLUB, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEMORANDUM OF RESPONDENTS SUPPORTING CERTIORARI

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MEMORANDUM OF RESPONDENTS SUPPORTING CERTIORARI

Respondents Sierra Club, Hank Schramm and William Dixon hereby inform the court that they support the granting of a writ of certiorari in this case. While respondents do not adopt or acknowledge the

validity of the statements and arguments set forth in the Petition, they agree with petitioners' conclusion that the Court should grant the writ in order to decide on the merits (1) whether the permit requirements of section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §403) are applicable to the type of state water project that is the subject of the petition, and (2) whether respondents and other private parties have a right to enforce the provisions of the Act by a civil action in a federal court. In respondents' view, it is necessary for this Court to resolve the first of these issues in order to dispel the erroneous notion - clearly manifested in the petition in this case and in the petition and brief of amici curiae in the companion case (State of California v. Sierra Club, No. 79-1252) and apparently espoused by the chief legal officers of sixteen western states - that this Court's decision in California v. United States, 438 U.S. 645 (1978), has conferred upon state water agencies a blanket exemption from the requirements of federal law relating to navigation and the environment. Similarly, the second of these issues ought to be resolved on

the merits by this Court because the plain intent of Congress to permit private enforcement of the Rivers and Harbors Act, accurately discerned by the Court below, has recently been disputed by other lower federal courts and hence may ultimately be frustrated unless it is reaffirmed by this Court. See City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979); Barcelo v. Brown, 478 F.Supp. 646 (D.P.R. 1979); Citizens Committee for Environmental Protection v. United States Coast Guard, 456 F.Supp. 101 (D.N.J. 1978).

For these reasons, respondents concur in the view that this case should be heard on the merits and they therefore join with petitioners in urging the Court to grant the writ.

Dated: April 8, 1980.

Respectfully submitted,

PETTIT & MARTIN
JOHN B CLARK
JAMES E. HARRINGTON
ROBERT B. THUM

No. 79-1502

IN THE

Supreme Court of the United States

MICHAEL RODAK, JR., CLERK

October Term 1980

KERN COUNTY WATER AGENCY, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, SANTA CLARA VALLEY WATER DISTRICT and TULARE LAKE BASIN WATER STORAGE DISTRICT,

Petitioners,

vs.

SIERRA CLUB, *et al.*,

Respondents.

BRIEF FOR PETITIONERS PUBLIC WATER AGENCIES.

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No. 79-1502

IN THE

Supreme Court of the United States

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KERN COUNTY WATER AGENCY, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, SANTA CLARA VALLEY WATER DISTRICT and TULARE LAKE BASIN WATER STORAGE DISTRICT,

Petitioners,

vs.

SIERRA CLUB, *et al.*,

Respondents.

QUESTIONS PRESENTED.

This case presents the following questions:

1. Does the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 401-418) create a private right of action that authorizes plaintiffs to commence and prosecute this action?

2. Does Section 10 of the 1899 Act (33 U.S.C. § 403) require a California state agency to obtain a federal operating permit from the United States Army Corps of Engineers, in order to divert water for reasonable, beneficial public uses, even if that diversion (1) represents the exercise of water rights established and regulated under state law, (2) is made through pumping facilities that are not located in navigable waters, (3) is made from an artifically created body of water, (4) is made through an intake structure which has been approved and permitted under the 1899 Act, and (5) does not interfere with navigation?

3. If the 1899 Act does require an operating permit, does the Section 10 permit that the Corps of Engineers issued to the California Department of Water Resources for the intake structure for Clifton Court Forebay prior to the filing of this action, satisfy that requirement?

PARTIES BELOW.

The parties to the proceeding in the Ninth Circuit whose judgment is sought to be reviewed consisted of:

1. The following plaintiffs, who are respondents in this Court:

The Sierra Club, a non-profit California Corporation,
Friends of the Earth,* a non-profit New York Corporation,
Hank Schram, a commercial fisherman, and
William Dixon, a landowner.

2. The following federal defendants, whose predecessors had originally been named as defendants in their official capacities, and who as appellants were given partial relief by the Circuit Court's opinion:

Cecil D. Andrus, Secretary of the Interior
Clifford L. Alexander, Secretary of the Army
R. Keith Higginson, Commissioner of the Water and Power Resources Service
Lt. Gen. Joseph K. Bratton, Chief of Engineers of the Army Corps of Engineers
Lt. Paul F. Kavanaugh, the Corps' Sacramento District Engineer
Col. Paul Bazilwich, Jr., the Corps' San Francisco District Engineer.

3. The following state officials, whose predecessors had also been originally named as defendants in their official capacities and who are petitioners in this Court:

Huey D. Johnson, Secretary of Resources
Ronald B. Robie, Director of the Department of Water Resources.

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*The Circuit court's opinion ordered the District court, on remand, to dismiss plaintiff Friends of the Earth for lack of standing. (Ptn. App., pp. 25-26).

4. Four California public water agencies that have contracted with the state for delivery of the water supply that is the subject of this case. Those agencies intervened on behalf of the State defendants when the action was before the District Court and are petitioners in this Court.

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No. 79-1502

IN THE

Supreme Court of the United States

October Term 1980

KERN COUNTY WATER AGENCY, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, SANTA CLARA VALLEY WATER DISTRICT and TULARE LAKE BASIN WATER STORAGE DISTRICT,

Petitioners,

vs.

SIERRA CLUB, *et al.*,

Respondents.

BRIEF FOR PETITIONERS PUBLIC WATER AGENCIES.

OPINIONS BELOW.

The Decision of the Ninth Circuit Court of Appeals is officially reported at 610 F.2d 581 and is reproduced on pages 5 to 62 of the Appendix to our Petition for Writ of Certiorari. The Decision of the District Court is officially reported at 400 F.Supp. 610 (N.D. Cal. 1975) and is reproduced at pages 63 to 129 of that same Appendix.[1]

JURISDICTION.

The Decision of the Court of Appeals was entered on October 31, 1979. The plaintiffs filed a petition for rehearing on November 21, 1979, which was denied on January 17,

[1]Hereafter referred to as "Ptn. App."

1980. Our Petition for Writ of Certiorari was filed on March 17, 1980 and was granted and consolidated with No. 79-1252 on October 6, 1980.[2] This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL LAWS INVOLVED.

This case involves an interpretation of Sections 10, 12 and 17 of the Rivers and Harbors Act of 1899 (30 Stat. 1151, 1153 (1899), 33 U.S.C. §§ 403, 406 and 413). These provisions are set forth in the appendix to this brief.

This case also involves an interpretation of 38 federal statutes that recognize State authority to regulate, under state law, water supply diversions. The relevant sections of those statutes are set forth in the Appendix to our Petition For Certiorari (Ptn. App., pp. 130-149).

STATEMENT OF THE CASE.

This case presents two fundamental controversies concerning the Rivers and Harbors Act of 1899. First, it presents a controversy over whether the language of the 1899 Act can reasonably be interpreted as creating a private right of enforcement, in light of several recent cases decided by this Court.

Second, it presents a controversy over the extent to which Congress intends to subordinate state water rights law to federal regulation. The circuit court opinion subordinates state law in a situation in which that law is not inconsistent with congressional directives within the meaning of this Court's decisions in *California v. United States* (438 U.S. 645, 98 S.Ct. 2985 (1978)) and *United States v. New Mexico* (438 U.S. 696, 98 S.Ct. 3012 (1978)).

The State of California has constructed and is operating a multi-billion dollar water project pursuant to the California

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[2]The State of California filed a similar petition on February 13, 1980 under No. 79-1252. The Court also granted that petition on October 6, 1980.

Water Resources Development Bond Act[3] (Cal. Water Code § 12930, *et seq.*). The State's electorate and the California Supreme Court have approved the project (Jt. App., p. 89a; *Metropolitan Water District v. Marquardt,* 59 Cal.2d 159 (1963)). The California Department of Water Resources (DWR) operates the SWP (Ptn. App., pp. 70, 71).

Intervenors and 27 other public water agencies have contracted with the State to repay the costs of constructing and operating the SWP, in return for deliveries of specific quantities of SWP water over at least the next fifty-five years. Petitioners need that water to meet the reasonable requirements of over half the people of the state and a significant proportion of California's agricultural economy (Ptn. App., pp. 8, 9, 66; Jt. App., pp. 99a-114a; State Exhs. 30, 31; R 495A-504, 506, 574, 956, 957).

Petitioners' contracts with the State for delivery of water from the SWP constitute an essential element of the SWP.[4] They provide the basic means for financing the multi-billion

---

[3]That project is technically identified by the Bond Act as the State Water Resources Development System (Cal. Water Code § 12931) but is commonly referred to as the State Water Project and will be generally designated hereafter as the "SWP".

[4]Those contracts and their reliance on State water law received wide public exposure and approval prior to initiation of SWP operations. The State's electorate approved the contracting authorization and its underlying financial structures, in November 1960 (Ptn. App., p. 66). The State Legislature subsequently reviewed and approved the terms of the prototype contract which the State executed with The Metropolitan Water District of Southern California, one of the petitioners herein. All of the SWP contracts are essentially the same as that contract. (September 5, 1974 *Joint Brief of Intervenors Upon Completion of the Trial on Entitlement to Relief;* District Court Docket Item 111.) In addition, the California Supreme Court upheld the constitutionality of both the prototype SWP contract and the Bond Act. (*Metropolitan Water District v. Marquardt, supra.*) Furthermore, local superior courts validated all of the other SWP water contracts, *e.g., Kern County Water Agency v. Purvines,* Kern County No. 90825 (1964); *Santa Clara County Flood Control and Water District v. State,* Santa Clara No. 151052 (1964); *Tulare Lake Basin Water Storage District v. All Persons,* Tulare County No. 17250 (1965).

dollar SWP and meeting the State's related constitutional limitation on State indebtedness (California Constitution Article XVI, Section 1). Those contracts are premised on the application of State water law to SWP's water diversions from the Sacramento-San Joaquin Delta, a navigable intrastate body of water, (Delta) (Ptn. App., p. 66; Joint Brief of Intervenors, District Court Docket Item 111).

The United States has built a similar multi-billion dollar water project, known as the Central Valley Project (CVP), to provide water for important public uses in the San Joaquin Valley and the South San Francisco Bay Area (Jt. App., pp. 91a-93a). The United States Water and Power Resources Service (WPRS), formerly the Bureau of Reclamation, operates the Central Valley Project (Ptn. App., pp. 9, 69, 70; Jt. App., pp. 91a-93a).

DWR and WPRS divert water from the Delta for the SWP and the CVP pursuant to water rights permits previously issued by the State of California through the California Water Resources Control Board (WRCB). The WRCB regulates those diversions under an extensive body of State water law. The State has developed that law through comprehensive constitutional and statutory controls, California Constitution, Article X, Section 2; Cal. Water Code Part 2, Division 2, and implementing judicial rulings (*Environmental Defense Fund v. East Bay Municipal Utility District*, 26 Cal.3d 183, 194 ff (1980)), in order to assure that California's water resources are used in an economically efficient and environmentally sound manner (Public Resources Code § 21000, *et seq.*).

The WRCB has reserved continuing jurisdiction over the SWP and CVP water rights permits in order to coordinate SWP and CVP water diversion operations and to protect prior vested water rights, water quality in the Delta, and fish and wildlife resources. Accordingly, the WRCB limits SWP and CVP operations to maintain specific salinity and

streamflow conditions in the Delta channels at specific times.[5]

Essentially, all the water supplies for the SWP are currently diverted from the Sacramento-San Joaquin Delta (Delta) through a water diversion facility known as the Delta Pumping Plant. (A map of the Delta, showing the Delta Pumping Plant in the southern portion thereof, is attached to the District Court opinion, Ptn. App., p. 129A.) That facility is located outside navigable waters and diverts water from an artificial body of water known as Clifton Court Forebay (Jt. App., pp. 90a, 91a).[6]

Clifton Court Forebay, in turn, is connected to the Delta by means of an intake structure that was installed in a levee of a Delta channel under a permit issued in 1967 by the Corps of Engineers pursuant to Section 10 of the Rivers and Harbors Act of 1899 (Jt. App., pp. 115a-119a; State Exh. 25; R127, 127A, 130, 131, 157-159). The terms of that permit reserve continuing jurisdiction to require removal or alteration of the intake structure or any obstructions caused by it, needed "to render navigation reasonably free, easy and unobstructed" (*Id.*, p. 117, para (f)).

The evidence in this case does not show that the SWP diversion of waters from the Delta Pumping Plant impedes present or prospective navigation or commerce, or that it obstructs the navigable capacity of any of the waters of the United States.

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[5]The WRCB revised the SWP and CVP Delta diversion water rights permits in August 1978, by issuing Water Rights Decision 1485. Plaintiff, Sierra Club, participated in the lengthy administrative proceedings on which the WRCB based that decision. Although fourteen suits are now pending in the California Superior Court challenging that decision, the Sierra Club has not challenged it. (Judicial Council Coordination Proceeding No. 548; San Francisco County Superior Court.)

[6]The CVP diverts water from the Delta through a facility known as the Tracy Pumping Plant that is also located outside of navigable waters. Although that plant is located in close proximity to the State's Delta Pumping Plant, it does not divert water from the State's Clifton Court Forebay.

PROCEEDINGS BELOW.

Plaintiffs filed this action in March 1971, to enjoin DWR and WPRS from diverting water from the SWP's Delta Pumping Plant and the CVP's Tracy Pumping Plant until the Corps of Engineers had issued operating permits for those diversions. Plaintiffs also sought to enjoin the Corps from granting that approval until it receives and considers reports prepared under the Fish and Wildlife Coordination Act (16 U.S.C. §§ 662 and 663) and the National Environmental Policy Act (NEPA) (42 U.S.C. §§ 4331 and 4332).

The District Court denied motions by the federal and State defendants for dismissal, and subsequently allowed petitioners to intervene as defendants in May 1974. The District Court approved an Agreed Pre-Trial Order on June 10, 1974 that, among other things, bifurcated the trial into two phases. That Order limited Phase One to a determination of plaintiffs' entitlement to relief; and provided that if the Court determined that plaintiffs are entitled to relief, a Phase Two trial would be held to determine what form that relief should take. The Phase One trial was held in June 1974, with the court rendering its opinion that plaintiffs were entitled to some relief, on July 28, 1975 (Ptn. App., pp. 63 to 129).

The District Court ruled that a private cause of action exists to enforce Section 10 of the 1899 Act (Ptn. App., pp. 72-80), and that plaintiffs had standing to sue. It concluded that the SWP and CVP diversions of water from the Delta obstructed navigable capacity, and enjoined defendants to obtain operating permits from the Corps of Engineers under Section 10 of the 1899 Act (Ptn. App., pp. 80-93, 127-128). The District Court also ruled that the Section 10 permits which the Corps had previously issued to DWR and WPRS did not cover either the SWP or the CVP diversion operations (Ptn. App., pp. 93-99). In addition, it dismissed the Fish and Wildlife Coordination Act issues on the basis that there is no private right of action to enforce that Act (Ptn. App., pp. 104-108).

The District Court ordered DWR and WPRS to obtain operating permits for their respective water diversions from the Corps under Section 10 of the 1899 Act. It also ordered the Corps to prepare an environmental impact statement (EIS) under NEPA before issuing those permits. The District Court issued an Interlocutory Order Granting Injunctive Relief on December 18, 1975 (Jt. App., pp. 122a-124a). All the defendants, including petitioners, appealed to the Ninth Circuit Court of Appeals.

The Circuit Court affirmed the existence of a private right of action under Section 10 of the 1899 Act (Ptn. App., pp. 11-22), but dismissed one of the plaintiffs, Friends of the Earth, for lack of standing (Ptn. App., pp. 25-26). It also affirmed that DWR must obtain operating permits from the Corps under Section 10 of the 1899 Act, in order to continue to divert Delta water through the SWP Delta Pumping Plant, unless otherwise exempted by Corps' regulations (Ptn. App., pp. 26-39). In addition, the opinion implied that the Corps can control the environmental impact of those diversions even if they do not affect navigation in any substantial way (Ptn. App., pp. 54-55, n. 39).

However, the Circuit Court reversed the District Court with respect to operation of the federal CVP Tracy Pumping Plant (Ptn. App., pp. 40-49). It ruled that Congress had impliedly approved that operation and had thus exempted it from any requirement of obtaining operating permits from the Corps under the 1899 Act.

SUMMARY OF ARGUMENT.

The Circuit Court improperly extends the 1899 Rivers and Harbors Act on the basis of three significant errors:

First, it improperly implies a private right of action to enforce that Act. It reaches that conclusion by failing to apply the now well-established rule that in ascertaining whether a private right of enforcement of a federal statute exists, primary emphasis must be given to Congressional

intent. Instead, the Circuit Court found that the usual statutory interpretation standards did not apply to the 1899 Act and decided that a private right of action should be inferred because the Court felt that such a right was necessary to protect private parties who suffer special injuries. (Ptn. App., p. 19). The emphasis on "utility" rather than on what Congress intended led the Circuit Court to the erroneous conclusion that private parties may sue to enforce the 1899 Act.

Second, the Circuit Court opinion vitiates important congressional policy by expanding Section 10 of the 1899 Act beyond its original purpose, into matters traditionally relegated to State water rights law. In approving this expansion of federal law, the Circuit Court's opinion rejects a long-standing congressional policy established in over three dozen federal statutes and recognized by this Court. That policy consists of the important principle in federal-state relations, of deferring to State water rights law wherever feasible. It is particularly applicable where, as here, federal control would duplicate, and in effect preempt, an existing state regulatory program.

The Circuit Court bases its expansion of Section 10 on a strained interpretation of that section, and relies on previous cases that dealt with matters that are not traditionally relegated to state law. Furthermore, each of those cases involved either unreasonable burdens on navigation or physical changes to the channel of navigable waters. Neither factor is present in this action. Indeed, the record does not support a conclusion that the challenged water supply diversions obstruct the navigable capacity of the waters of the United States.

Third, even if the challenged water supply diversions should fall within the regulatory ambit of Section 10, the Circuit Court's opinion refuses to recognize that the explicit terms of the Section 10 permit that the United States issued

to the State prior to the filing of this action are sufficiently broad to protect the federal navigation servitude.

ARGUMENT.

I.

THE CIRCUIT COURT OPINION IMPROPERLY IMPLIES A PRIVATE RIGHT OF ACTION TO ENFORCE SECTION 10 OF THE 1899 ACT.

A. Introduction.

The question of whether a particular federal statute may be enforced by private individuals or groups has been the subject of several important decisions of this Court over the past six or seven years. The opinions in *National Railroad Passengers Corp. v. National Association of Railroad Passengers* (the "*Amtrak* case"), 414 U.S. 453, 94 S.Ct. 690 (1974); *SIPC v. Barbour*, 421 U.S. 412, 95 S.Ct. 1733 (1975); *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080 (1975); *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S.Ct. 2479 (1979); and *Transamerica Mortgage Advisors Inc. (TAMA) v. Lewis*, 444 U.S. 11, 100 S.Ct. 242 (1979), have established an analytical procedure which must be followed to ascertain whether Congress, in passing a statute, intended to create a private right to enforce its prohibitions.

Cort v. Ash is the most important of the earlier decisions as it instructed the lower courts to utilize a four-part test to determine a private right of action issue. The elements of the test are: (1) Is the plaintiff one of the class for whose especial benefit the statute was enacted; (2) Is there any indication of legislative intent, explicit or implicit, either to create a private remedy or to deny one; (3) Is it consistent with the underlying purpose of the legislation to imply a private remedy; and (4) Is the cause of action one traditionally relegated to state law, so it would be inappropriate

to infer a cause of action based solely on federal law. *Cort v. Ash,* 422 U.S. at 78, 95 S.Ct. at 2088.

However, it is the later cases, those decided in 1979, which are most important to the arguments which follow. The decisions in the *Cannon, Touche Ross,* and *TAMA* cases, *supra*, have clarified and refined the *Cort v. Ash* tests and emphasize that the "central inquiry" is to determine "whether Congress intended to create, either expressly or by implication, a private cause of action." *Touche Ross v. Redington,* 442 U.S. at 575, 99 S.Ct. at 2489.

The Circuit Court opinion in this case has a striking omission. Although it was issued on October 31, 1979, it does not even mention, much less discuss, the *Cannon* and *Touche Ross* cases which had been decided by this Court in May and June of that same year. As a result, the Circuit Court failed to give the required emphasis to congressional intent and instead determined that a private right of action should be inferred as "necessary to protect private parties who suffer special injuries." (Ptn. App., p. 19)

This brief will attempt to fill the analytical void in the Circuit Court opinion. We will first describe the rules established by this Court's most recent cases for determining if a private right of action exists and will then apply those rules to the 1899 Act. This exercise, we believe, must lead to the conclusion that the 1899 Act does not create a private right of action, and that the Circuit Court's failure to follow this Court's guidance resulted in an erroneous decision.

B. The Primary Question to Be Examined Is Whether Congress Intended to Create a Private Right of Action.

Cort v. Ash, as noted above, established a four-part test to determine if a private right of enforcement has been created. But the law is now clear that the primary purpose of the test is to determine if *Congress* intended to create the private cause of action. The latest statement of this principle

is contained in *TAMA v. Lewis, supra*, decided by this Court last session. In discussing the Investment Advisors Act, Justice Stewart stated:

> The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction. [Cites] While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, *e.g., J. I. Case Co. v. Borak, supra,* what must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear. [Cites] We accept this as the appropriate inquiry to be made in resolving the issues presented by the case before us. (444 U.S. at 15-16, 100 S.Ct. at 245)

1. Congressional Intent Tests.

Turning to the statutory construction and Congressional intent arguments, we begin, of course, with the language of the statute itself. *Touche Ross & Co. v. Redington,* 442 U.S. at 568, 99 S.Ct. at 2485. The recent cases have utilized three tests to determine Congressional intent. Two of the tests, a public duty test and an enforcement test, analyze statutory language. The third test analyzes legislative history.

a. *BENEFIT TEST.*

Cannon v. University of Chicago, supra, establishes what may be referred to as a "benefit" test. That decision first distinguished statutes which refer to a special class to be benefited from statutes enacted for protection of the general public (441 U.S. at 689, 99 S.Ct. at 1953-4) and then continued:

> There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting [the statute under consideration] with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recip-

> ients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices. (441 U.S. at 690-693, 99 S.Ct. at 1954-55)

Footnote 13 of the *Cannon* opinion is particularly helpful in demonstrating how this distinction should be applied, as it contrasts the type of language which can fairly lead to an inference that private rights of action were intended from those where the inference is not available. In that footnote the Court reiterated:

> Conversely, the Court has been especially reluctant to imply causes of action under statutes that create duties on the part of persons for the benefit of the public at large. (441 U.S. at 692, 99 S.Ct. at 1955)

This, then, is the first test for interpreting the statutory language: Are the duty creating sections designed to protect specific individuals and groups or the general public? If the general public is the primary beneficiary, the Court should hesitate to infer Congressional intent to create a private right of action in the absence of other positive contrary evidence.

b. *ENFORCEMENT LANGUAGE TEST.*

The Second approach to analyzing the statutory language examines the enforcement provisions to determine if they include or exclude private individuals or groups. This approach was articulated in the *Amtrak* case as follows:

> A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted Mills v. United States*, 278 U.S. 282, 289, 49 S.Ct. 129, 132, 73 L.Ed. 379 (1929). This principle of statutory construction reflects an ancient maxim — *expressio unius est exclusio alterius*. Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maxim

> would clearly compel the conclusion that the remedies created in § 307(a) are the exclusive means to enforce the duties and obligations imposed by the Act. (414 U.S. at 458, 94 S.Ct. at 693)

This concept has been regularly applied in the private right of action cases being discussed herein, and was most recently stated in *TAMA v. Lewis* as follows:

> [I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." [Cites] Congress expressly provided both judicial and administrative means for enforcing compliance with § 206 [of the Investment Advisors Act]. First, under § 217 willful violations of the Act are criminal offenses, punishable by fine or imprisonment, or both. Second, § 209 authorizes the Commission to bring civil actions in federal courts to enjoin compliance with the Act, including, of course, § 206. Third, the Commission is authorized by § 203 to impose various administrative sanctions on persons who violate the Act, including § 206. *In view of these express provisions for enforcing the duties imposed by § 206, it is highly improbable that "Congress absentmindedly forgot to mention an intended private action." Cannon v. University of Chicago,* .... U.S., at .... , 99 S.Ct., at 1981 (POWELL, J., dissenting). (444 U.S. at 19-20, 100 S.Ct. at 247; emphasis added)

This, then is the second test for interpreting statutory language: If the enforcement sections create specific methods of enforcement, the court should treat these methods as exclusive in the absence of other positive contrary evidence.

c. *LEGISLATIVE HISTORY TEST.*

In stating the two rules discussed above, the phrase "in the absence of other positive contrary evidence" has been included each time. This caveat has been added because the cases clearly hold that "even settled rules of statutory con-

struction could yield, of course, to *persuasive* evidence of a contrary legislative intent." *TAMA v. Lewis*, 444 U.S. at 20, 100 S.Ct. at 247 (emphasis added); also see the *Amtrak* case, 414 U.S. at 458, 94 S.Ct. at 693. Therefore, all of the cases review the legislative history of the act in question. In reviewing legislative history, however, it is important to keep in mind the kind of evidence which is necessary to overcome the interpretation flowing from the language of the statute itself. The word "persuasive", emphasized in the quote above militates against arguments that a private action may be inferred simply because the legislative history is silent on the subject.

In the *Touche Ross* case, the respondents argued that because Congress did not expressly deny a private cause of action, the Court should infer one. This Court replied:

> But implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best. [cite] And where, as here, the plain language of the provision weighs against implication of a private remedy, the fact that there is no suggestion whatsoever in the legislative history that [the statute in question] may give rise to suits for damages reinforces our decision not to find such a right of action implicit within the section. (442 U.S. at 571, 99 S.Ct. at 2486-87)

This, then, is the third test for determining the meaning of the statutory language: If the plain language of the law weighs against a private right of action, positive contrary legislative history is necessary to overcome this presumption. Congressional silence on the issue is insufficient.

2. A Utility Test May Not Be Used to Overcome Clear Evidence of Congressional Intent.

The concepts discussed above are the primary means recently established by this Court for determining whether Congress intended to create a private right of action. Before applying the concepts to the 1899 Act, however, one other judicial clarification of the four-part test established by *Cort*

v. Ash resulting from the opinions in *Touche Ross v. Redington* and *TAMA v. Lewis* must be considered.

Under that clarification, clear evidence that Congress did not intend to create a private right of action is not negated by an argument that a private right of action would be "useful" to enforcement of the statute in question. Numerous lower courts read *Cort v. Ash* as authorizing the creation of a private right of action in the absence of any evidence that Congress intended to preclude such an action if the private action would be "useful" or "necessary" to effectuate the purpose of the statute. This Court has now clearly ruled that such an approach constitutes error.

In *Touche Ross v. Redington,* this Court stated:

> SIPC and the Trustee urge, and the Court of Appeals agreed, that the analysis should not stop here. Relying on the factors set forth in *Cort v. Ash,* 422 U.S., at 78, 95 S.Ct., at 2088, they assert that we also must consider whether an implied private remedy is necessary to "effectuate the purpose of the section" and whether the cause of action is one traditionally relegated to state law. SIPC and the Trustee contend that implication of a private remedy is essential to the goals of § 17(a) and that enforcement of § 17(a) is properly a matter of federal, not state, concern. . . . We need not reach the merits of the arguments concerning the "necessity" of implying a private remedy and the proper forum for enforcement of the rights asserted by SIPC and the Trustee, for we believe such inquiries have little relevance to the decision of this case. It is true that in *Cort v. Ash, supra,* the Court set forth four factors that it considered "relevant" in determining whether a private remedy is implicit in a statute not expressly providing one. But the Court did not decide that each of these factors is entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action. Indeed, the first three factors discussed in *Cort*—the language and focus of the statute, its legislative history, and its purpose, see 422 U.S., at 78, 95 S.Ct., at 2088—are ones traditionally relied

> upon in determining legislative intent. Here, the statute by its terms grants no private rights to any identifiable class and proscribes no conduct as unlawful. And the parties as well as the Court of Appeals agree that the legislative history of the 1934 Act simply does not speak to the issue of private remedies under § 17(a). At least in such a case as this, the inquiry ends there: The question whether Congress, either expressly or by implication, intended to create a private right of action, has been definitely answered in the negative. (442 U.S. at 575-76, 99 S.Ct., at 2489)

Last term, in the *TAMA* case, this Court, once again, rejected the notion that utility can create a private right when there is no evidence that Congress intended to create the right, stating:

> [T]he mere fact that the statute was designed to protect advisers' clients does not require the implication of a private cause of action for damages on their behalf. [Cites] The dispositive question remains whether Congress intended to create any such remedy. Having answered that question in the negative, our inquiry is at an end. (444 U.S., at 24, 100 S.Ct. at 249)

3. Summary.

What is evident from the cases discussed above is that this Court over the past six or seven years has been developing an analytic system to ascertain if federal statutes create private causes of action. *Cort v. Ash* was the first attempt to articulate a usable test. However, the lower courts applied the *Cort v. Ash* test too mechanically, not recognizing that its primary purpose was to ascertain legislative intent.[7] The subsequent cases have stressed this aspect of the analysis and have established that *Cort v. Ash* cannot be used to create a private action based on utility or necessity in the absence of any evidence that Congress intended to create

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[7]See Justice Powell's dissent in *Cannon v. University of Chicago*, 441 U.S. at 730, 99 S.Ct. at 1974 ff and his concurrence in *TAMA v. Lewis*, 444 at 25, 100 S.Ct. at 249.

such a right. The next portion of this brief will apply the analysis set forth above to the 1899 Act and will show that the Ninth Circuit opinion, in spite of the fact that it was issued after this Court's decisions in *Cannon* and *Touche Ross*, ignored these cases and mechanically applied the *Cort v. Ash* test in a manner which led to an erroneous conclusion.

C. Congress Did Not Intend to Create Private Rights to Enforce the 1899 Act.

1. Neither the Act's Enforcement Language nor Its Duty Creating Language Can Be Interpreted as Providing a Private Right of Action.

There are three enforcement provisions in the 1899 Act: Section 12 (33 U.S.C. § 406), Section 16 (33 U.S.C. § 411) and Section 17 (33 U.S.C. § 413). Section 16 is not relevant to the discussion which follows because this case only involves alleged violations of Section 10 of the Act. (33 U.S.C. § 403, Ptn. App., pp. 1, 2.) Section 16 only applies to violations of Sections 13, 14 and 15 of the 1899 Act. Therefore, the key enforcement language is found in Sections 12 and 17. These sections, as codified in 33 U.S.C., are set forth in the Appendix to this brief. *They specifically state that the Attorney General and the Department of Justice shall enforce the 1899 Act.*

As discussed in the previous section of this brief, such a specific delegation of enforcement powers to one organization uniformly has been held to imply that no other means of enforcement was intended, *SIPC v. Barbour, supra*, 421 U.S. at 419 95 S.Ct. at 1738 (1975); *Amtrak, supra*, 414 U.S. at 458, 94 S.Ct. at 693; *TAMA v. Lewis, supra*, 444 U.S. at 20, 100 S.Ct. at 247. Hence, the analysis of the 1899 Act begins with presumption that private rights of action were *not* intended.

It is however, the *Cannon* case which is most instructive when analyzing the 1899 Act. As discussed earlier, *Cannon* focused on the "right-or-duty-creating language" of the

statute and articulated a benefit test. It distinguished laws that confer a benefit directly on a class of persons from those that create duties for the benefit of the public at large (441 U.S. at 690-93, 99 S.Ct. at 1954-5; see, particularly, footnote 13). In the latter instance, the Court noted that it has been reluctant to imply private causes of action.

This dichotomy is especially relevant to the 1899 Act as the *Cannon* opinion, in footnote 13, singled out the 1899 Act as an example of a statute which creates a duty in favor of the public at large. The conclusion that the 1899 Act is a public benefit statute is supported by the analysis contained in footnote 13, which utilized the language of the statutes involved in a number of cases, including *Piper v. Chris-Craft Industries*, 430 U.S. 1, 97 S.Ct. 926 (1977), *Cort v. Ash, supra,* and *Amtrak, supra,* as examples of statutes designed to protect the general public. In each of those cases, the statute, without reference to particular individuals or groups, generally proscribed conduct as unlawful or prohibited when it was inconsistent with the statutory policy.

The language of Sections 9 and 10 of the 1899 Act is identical in concept to the statutes discussed in footnote 13 of the *Cannon* case. Section 9 makes it unlawful to construct facilities in navigable waterways until the plans are approved by the Chief of Engineers and the Secretary of the Army. Section 10 states that the creation of any obstruction not authorized by Congress, or in certain cases by the Chief of Engineers and the Secretary of the Army, is "prohibited" or "unlawful." There is no language in the sections directed to any particular persons or groups. In the face of the similarity between the 1899 Act and the statutes discussed in footnote 13, there is little wonder that the *Cannon* opinion chose to highlight the 1899 Act as a law designed to protect the public at large.

2. The Legislative History of the 1899 Act Supports the Conclusion That No Private Right of Action Was Intended.

The language of the 1899 Act itself, using both the enforcement and the public duty tests recently adopted by this Court, weighs heavily against the implication of a private

right of action. the legislature history of the Act supports this conclusion.

No party to this litigation has ever pointed to any history indicating that Congress intended to create a private right of action. Therefore, this case falls within the guidelines established by the *Touche Ross* decision, described above. When the plain language of a statute weighs against implication of a private remedy, the lack of legislative history to countervail this interpretation should reinforce the conclusion that the remedy does not exist.

In this case, however, there is more than silence. There is one relevant piece of legislative history which supports the conclusion that Congress did not intend to create a private right of action. To fully understand this history, some background on the 1899 Act is necessary.

Justice Harlan's dissent in *United States v. Republic Steel Corporation*, 362 U.S. 482, 499-504 80 S.Ct. 884, 894-97 (1960), contains an excellent summary of the legislative history of the 1899 Act. It is there pointed out that the provisions of the 1899 Act dealing with obstructions derive ultimately from a proposal transmitted to Congress by the Secretary of War in 1877. Numerous bills were introduced and began passing through Congress. However, it was not until 1890 that the comprehensive statute was enacted. In 1887, during the 50th Congress, 1st Session, S. 27 was the navigable waters bill. At that time what ultimately became Section 10 of the 1899 Act was Section 2 of S. 27 and, as amended, read as follows:

> Sec. 2. That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, wier, breakwater, bulkhead, jetty, or other structure outside established harbor lines without the permission of the Secretary of War in any port, roadstead, haven, harbor, navigable river, or other waters of the United States or in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters; and it shall not be lawful hereafter to commence the construction of any bridge,

> bridge-draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable waters of the United States, unless approved and authorized by the Secretary of War.

As can be seen, the last phrase of Section 2 of S. 27 is very similar to Section 10 of the 1899 Act.

On March 22, 1888, the Senate considered S. 27, including Section 5 of the act, which until that date read as follows:

> Sec. 5. That every person, persons, or corporation offending against the provisions of this act shall, for each and every such offense, forfeit and pay a penalty of $250 besides such other sum as may be found in any action for the recovery of the penalty or penalties incurred under this act to be the expense of making good the damage incurred or of removing to a proper place the thing deposited in violation of this act, such penalties to be recoverable by and in the name of the United States of America, with costs, in any circuit or district court of the United States, at the suit of any district attorney of the United States, *or at the suit of any person,* by information to any district attorney in any district where or near to where the offense shall have been committed or the offender shall be. (Emphasis added.)

The Senate amended the procedural portion of this section by striking the quoted language beginning with "such penalties" through the end of the section, and substituting therefor the following language:

> such penalties to be recovered by action in the name of the United States in any district court within whose jurisdiction such offense shall be committed, said action to be instituted by the district attorney for such

> district at the instance of any person complaining. (19 Congressional Record 2338)

As can be seen, the enforcement section which was directed to Section 2 was amended to eliminate the language "or at the suit of any person." There could only be one reason for this amendment, to clarify the fact that enforcement powers were limited to the district attorneys of the United States.

S. 27 was not enacted; but in 1890, language nearly identical to Section 2 of S. 27 was enacted, and ultimately became Section 10 of the 1899 Act (Act of September 19, 1890, c. 907, §§ 7-11, 26 Stat. 954-5). Even though the enforcement language of Section 5 of S. 27 was broadened to include injunctive relief, the language authorizing private enforcement was not reinserted.

The Ninth Circuit opinion recognized the existence of this history, but avoided its import as follows:

> A close reading of the amendment, however, discloses that the Senate was addressing the question whether a private party could enforce the penal provisions of the legislation . . . The amendment does not indicate a legislative intent to preclude other actions under the 1899 Act. (Ptn. App., p. 15, fn. 9)

Such a narrow reading of legislative history is contrary to the reasoning of both the *Touche Ross* and *TAMA* cases. In those cases, this Court pointed out portions of the laws in question where Congress had expressly provided for private remedies and compared them to sections where Congress had been silent on the issue, *Touche Ross v. Redington,* 442 U.S. at 569-82, 99 S.Ct. at 2487; *TAMA v. Lewis,* 444 U.S. at 20-21, 100 S.Ct. at 247-8. Then the opinions continued:

> Obviously, then, when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly. (*Touche Ross v. Redington,* 442 U.S. at 572, 99 S.Ct. at 2487; *TAMA v. Lewis,* 444 U.S. at 21, 100 S.Ct. at 248)

This rationale is exactly why the legislative history of the 1899 Act is important. Even in 1899 Congress knew how to create a private right of action, and did so expressly. Further, Congress knew how to delete those express provisions and did so in 1887. Applying the words of the *TAMA* opinion to the 1899 Act: "What evidence of intent exists in this case, circumstantial though it may be, weighs against the implication of a private right of action. . . ." (444 U.S. at 20, 100 S.Ct. at 247.)

D. The 1899 Act Is Not Exempt From the Analysis Set Forth in This Brief.

As can be seen from the discussion above, all of the techniques for ascertaining legislative intent lead to the conclusion that Congress did not intend to create a private right of action. In spite of this, the Circuit Court opinion concluded that a private right of action should be inferred as "necessary to protect private parties who suffer special injuries." (Ptn. App., p. 19).

In relying on this "utility" analysis, the Circuit Court erred. It ignored the *Touche Ross* admonition that the inquiry is to end when it has been determined that Congress did not intend to create a private right of action. (442 U.S. at 576, 99 S.Ct. at 2489) Instead, the Circuit Court continued and applied a "utility" test by considering its own notion of what would be desirable. It undertook an exercise in judicial legislation.

The Circuit Court's error appears to have resulted from a combination of factors. First, that Court seems to have interpreted *Cort v. Ash* in the manner described in Justice Powell's dissent in the *Cannon* case, as inviting independent judicial determinations of what the goals of a law should be and how best they can be advanced (441 U.S. at 740-41, 99 S.Ct. at 1980-81). As noted previously, however, the *Touche Ross* and *TAMA* opinions make it clear that such a reading of *Cort v. Ash* is in error.

Second, the Circuit Court did not terminate its analysis with the ascertainment of Congressional intent, apparently because it was unaware of the *Cannon* and *Touche Ross* cases. Therefore, the Circuit Court opinion did not carry out the analytical procedure established by those cases and, as a result, reached the wrong conclusion on Congressional intent.

Third, the Circuit Court did not utilize the statutory interpretation test set forth in *Amtrak* and *SIPC v. Barbour* because it believed that this Court's decision in *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 88 S.Ct. 379 (1967) exempted the 1899 Act from such scrutiny. The Ninth Circuit's opinion, referring to *Amtrak, Barbour* and the enforcement language of the 1899 Act concluded:

> Normally, these express statutory provisions would imply that no other means of enforcement are intended, with only clear contrary evidence of a legislative intent to rebut the presumption. [Cites] This principle, however, does not apply to the Rivers and Harbors Act of 1899 (Pet. App., p. 16)

The *Wyandotte* case, however, is simply not precedent for a private right of action issue. *The United States was the plaintiff in Wyandotte*, and the Court did not even address the issue of private parties' right to suit. In *Wyandotte*, the defendant contended that a sunken vessel could be abandoned, thereby relieving its owner of the duty of raising it and removing it as a navigational obstruction. Defendant further claimed that if the United States removed the vessel, the United States could only recover its costs by selling the vessel and its cargo, but could not obtain a personal judgment against its owner if the removal costs exceeded the salvage value. It was in this context, where the Government had spent several million dollars raising a dangerous barge load of liquid chlorine from the bottom of the Mississippi River, that this Court said:

> But our reading of the Act does not lead us to the conclusion that Congress must have intended the stat-

> utory remedies and procedures to be exclusive of all others. There is no indication anywhere else — in the legislative history of the Act, in the predecessor statutes, or in nonstatutory law — that Congress might have intended that a party who negligently sinks a vessel should be shielded from personal responsibility. We, therefore, hold that the remedies and procedures specified by the Act for the enforcement of § 15 were not intended to be exclusive. Applying the principles of our decision in *Republic Steel,* we conclude that other remedies, including those here sought, are available to the Government. (389 U.S. at 200-201, 88 S.Ct. at 385.)

To use this language to render the usual rules for ascertaining the existence or nonexistence of a private right of action inapplicable to the 1899 Act extends the *Wyandotte* case far beyond its holding. It ignores the fact that the objective of that case was to protect the *United States'* right to fully protect navigable waterways and the fact that the language quoted above ends with the phrase "other remedies . . . are available to the Government." *Id.* It further ignores *Wyandotte's* later statement that "a principal beneficiary of the Act, if not the principal beneficiary, is the government itself." *Id.* It is one thing to hold that the principal beneficiary of the Act (The United States) should have broad remedies available to protect the public waterways of this nation. It is a far different thing to use such a holding to rule that the 1899 Act is exempt from the normal rules of statutory interpretation. Yet, it was just such a conclusion which led the Court of Appeals to reject this Court's rulings in *Amtrak* and *SIPC v. Barbour.*

Finally, the Circuit Court apparently believed that this Court ruled *sub silentio,* in *State of Wisconsin v. State of Illinois,* 278 U.S. 367, 49 S.Ct. 163 (1929) that others beside the federal government may enforce the 1899 Act (Pet. App., p. 14, fn. 8). In footnote 8 of its opinion (Ptn. App., p. 14), the Circuit Court states that plaintiffs in *Wisconsin v. Illinois* alleged a violation of the 1899 Act in their

complaint and sought an injunction against diversions from Lake Michigan. The footnote continues by deciding that since the Supreme Court considered the case on its merits, it must have found that a private right of enforcement exists. This statement totally overlooks the difference between the plaintiffs' jurisdictional pleadings in *Wisconsin v. Illinois* and the basis on which the court accepted jurisdiction.

It is obvious from reading the *Wisconsin v. Illinois* opinion that plaintiffs pleaded several causes of action, one of which may very well have been violation of the 1899 Act. But it is equally obvious that the Supreme Court may have considered plaintiffs' claims on the basis of allegations which did not involve an attempt by plaintiffs to privately enforce the Act. The Court stated:

> The controversies have taken a very wide range. The exact issue is whether the State of Illinois and the Sanitary District of Chicago by diverting 8,500 cubic feet from the waters of Lake Michigan have so injured the riparian and other rights of the complainant states bordering the Great Lakes and connecting streams by lowering their levels as to justify an injunction to stop this diversion and thus restore normal levels. Defendants assert that such a diversion is the result of congressional action in the regulation of interstate commerce, that the injury, if any, resulting is *damnum absque injuria* to the complaining states. (278 U.S. at 410, 49 S.Ct. at 169)

Given this statement by the Court, its decision to decide the case on the merits cannot be equated with a *sub silentio* holding that the 1899 Act could be privately enforced. An independent jurisdictional ground — damage to riparian and other rights — existed, and the Court's decision to consider the case on the merits could just as easily have been based on that ground. The opinion's careful attention to the 1899 Act does not alter this possibility. The need to examine the 1899 Act did not arise from any attempt by plaintiffs to enforce the 1899 Act, but rather from defendants' attempt to use the Act as a shield from liability.

None of the four reasons discussed above provides a basis for the Circuit Court's decision to exempt the 1899 Act from normal scrutiny under the recent cases and to extend its inquiry beyond Congressional intent into the area of the utility or the need for a private right of action. Yet, that is precisely what was done in this case; and reversal is, therefore, required.

E. The Plaintiffs' Claims Are in an Area Traditionally Relegated to State Law.

Because the recent cases have emphasized the importance of determining Congressional intent, this brief has not yet discussed one factor of the *Cort v. Ash* test. That factor is whether the action is traditionally relegated to state law in an area basically the concern of the states. (422 U.S. at 78, 95 S.Ct. at 2088) This test also provides substantial support to the argument that Congress did not intend to create a private right of action under the facts of this case and to a policy argument in favor of relegating this case to the California State courts.

Plaintiffs seek by this action to restrict water supply diversions which are regulated under State water law that represents an exercise of historical State Police power. It is clear from a reading of the complaint that plaintiffs are not interested in interferences with boating, shipping, commerce, and similar matters which have traditionally been the focus of the 1899 Act. Instead, they are attempting to force the Corps of Engineers to utilize their regulatory authority over navigation, in order to impose water quality and fish and wildlife protection conditions on water diversion activities of the State of California. (Jt. App., pp. 22a-48a; Ptn. App., p. 69)

However, the State of California regulates the water diversions that plaintiffs challenge, under State water rights appropriations laws that are based on the exercise of its police powers (*Joslin v. Marin Mun. Water Dist.*, 67 Cal.2d

132, 144 (1967)), as incorporated in Article 10, Section 2 of its Constitution. (See *People v. Forni*, 54 Cal.App.2d 743, 749-50 (1976).) The United States has traditionally relegated that control to the states for more than a century as described in a subsequent portion of this brief *(Jennison v. Kirk*, 98 U.S. 453 (1879); *California v. United States, supra).*

It is abundantly clear, therefore, that the appropriation of waters within California's borders is an activity that is basically the concern of that State, and that the control of that activity has been traditionally relegated to the State. This creates an additional strong reason why, on the facts of this case, the Court of Appeals should not have found a private right of action to enforce Section 10 of the 1899 Act.

II.

THE CIRCUIT COURT OPINION EXPANDS THE SCOPE OF SECTION 10 BEYOND THAT INTENDED BY CONGRESS.

The Circuit Court opinion vitiates important Congressional policy by extending the 1899 Act beyond its original purpose, into matters traditionally relegated to State law. That extension is based on a strained technical interpretation of Section 10 of the 1899 Act that does not further the purposes of the Act. It would significantly expand the manner in which the Government has administered the Act over the past 80 years. It would require the Corps of Engineers to act as a national water rights regulator independently of either navigation burdens or State water rights law.

By thus subordinating state water rights law to federal control, the Circuit Court opinion would preempt an important principle of federal-state relations. Congress has proclaimed that principle in dozens of statutes, and this Court has recently reaffirmed it in *California v. United States, supra* and *United States v. New Mexico, supra*. The principle, in short, is one of deference to state water rights

law in the absence of some tangible inconsistency with a clear federal interest. The Circuit Court's subordination of this traditional state concern is based on a defective application of federal statutes other than the 1899 Act.

California has adopted comprehensive water rights allocation laws (California Water Code Divisions 1 and 2) that incorporate comprehensive environmental (Cal. Public Resources Code § 21000, *et seq.*) and water quality (Cal. Water Code § 13000, *et seq.*) protection statutes. It applies those statutes to all water diversions within the state, including the State Water Project diversions that this action challenges. The Circuit Court opinion would allow the Federal Government to veto all basic decisions made by the State of California involving its totally intrastate water project, even if no federal navigational interests were affected. That would improperly distort the intent of the 1899 Act and seriously undermine the State's control over its water resources.

The Circuit Court's expansion of the 1899 Act at the expense of California's water rights and environmental protection law, is premised on two other serious defects, First, it relies on a strained technical interpretation of the plain language of the first clause of Section 10 of the 1899 Act, which unnecessarily expands the concept of obstructions to navigable capacity. Second it, in effect, strikes one of the key words of the third clause of that section, in order to include water supply diversion operations within the clause.

A. The Circuit Court Opinion Vitiates Important Congressional Policy.

The Circuit Court opinion incorporates Congressional policy from other federal statutes to justify its strained interpretation of Section 10. However, it refuses to incorporate more relevant, and indeed more current, Congressional policy established in numerous federal water resource statutes. As a result, the opinion circumvents the long-standing

Congressional policy of preserving state jurisdiction over water rights allocations.

It, therefore, vitiates much of that policy, because most of the nation's public water supplies are diverted from navigable surface streams.[8] The opinion would in effect destroy the State's control over these critical resources, as well as Congressional protection of that control. It reaches that result by holding that any technical alteration of navigable waters triggers general federal regulatory jurisdiction, even if the alteration does not burden present or prospective navigation.

The Circuit Court's refusal to incorporate the well-established Congressional policy of deferring to state water rights law constitutes an implied repeal of the statutory provisions that declare that policy. That refusal is in sharp contrast with the principle established by the decisions of this Court of not favoring implied repeals. It is also inconsistent with the general principle established by this Court that the Federal Government should not preempt state regulatory power in the absence of persuasive reasons.

1. Congress Has Legislated a Clear Policy of Deferring to State Water Rights Laws.

In the 112 years between 1866 and 1978, Congress has adopted over three dozen statutes that establish a consistent and well-defined policy of recognizing state water rights laws, and of deferring to those laws in all respects not directly inconsistent with Congressional directives. Petitioners have identified the relevant provisions of 38 of those statutes (Ptn. App., pp. 131-151). The quoted statutes begin

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[8]Over 300 billion gallons of fresh water are diverted from the nation's surface streams each day. *The Nation's Water Resources 1975-2000: Second National Water Assessment by The U.S. Water Resources Council*, Volume 1 (1978), pp. 18 and 29. Currently, State and local agencies administer nearly all of those diversions, *The Nation's Water Resources: First Annual Assessment of the Water Resources Council* (1968), p. 5-1-1.

with the Act of July 26, 1866 (recognizing water rights established in the public domain under local authority) and continue through the Clean Water Act of 1977 (deferring to state authority to allocate waters and to water rights established under that state authority).

Those statutes cover a broad spectrum of water supply, water quality, and water rights adjudication matters, that have direct application to navigable waters. Indeed, Congress has continued to reassert its policy of deferring to State water rights law, in water resources legislation enacted after the District Court filed its opinion in this case (Ptn. App., pp. 148-151).

The State of California has described the development of state water rights laws at some length in its Brief on the Merits in No. 79-1252, and has admirably traced the development of the Congressional policy of deference to those laws. We, therefore, adopt that portion of the State's brief (State Brief, pp. 19-36).

2. The Circuit Court Opinion Rejects the Established Congressional Policy of Deference to State Water Rights Law.

The Circuit Court chose to reject the congressional policy of deference to state water rights law (Ptn. App., p. 33, n. 26). The basic thrust of the Court's action is to limit a state regulated water supply diversion authorized and administered under state water rights law. To reach this result, the Circuit Court had to rely on policy considerations in federal environmental statutes that are less relevant to this case than is the Congressional policy of deferring to state water rights law (*Id.*, pp. 24, 32).

More specifically, the Circuit Court relied on Fifth Circuit dredge and fill cases that expanded the scope of the 1899 Act to include environmental controls over those types of activities (*Zabel v. Tabb*, 430 F.2d 199, 208-214 (1970); *United States v. Moretti* (*Moretti I*), 478 F.2d 418, 429 (1973)). Dredge and fill activities are not activities tradi-

tionally relegated to state law, as are water supply diversions. None of the Fifth Circuit cases involved issues of federal-state water jurisdiction that are so central to this case. Consequently, the courts in those cases did not consider the Congressional policy of deferring to state water law.

Environmental policy considerations are, of course, relevant to those activities, and, indeed, to water diversion activities. But, as noted previously, California already imposes strict environmental controls on Delta water export operations, through its regulation of water diversion rights (Calif. Water Code §§ 1243, 1243.5, 1257 and 1258; *EDF v. East Bay MUD, supra*) and through its environmental quality act (Calif. Public Resources Code Section 21000, *et seq.*) There is, therefore, no reason to thrust the Corps of Engineers into the water diversion regulation business when federal navigational interests are absent simply to regulate environmental matters. But this is precisely what the Circuit Court's decision does.

Federal subordination of state water supply diversion controls would be particularly disruptive in this case. It would, in fact, undermine the institutional structure of California's multi-billion dollar State Water Project, which has been designed to provide essential public water supplies to two-thirds of the State's population over at least the next 55 years (Jt. App., pp. 99a-114a; State Exhibit 30, articles 2, 4, 45 and 31, *supra*). California's electorate and its Supreme Court have approved the project (Jt. App., p. 89a; *Metropolitan Water District v. Marquardt*, 59 Cal.2d 159 (1963); Joint Brief of Intervenors, District Court Docket Item 111).

If the United States, rather than the State, is allowed to regulate the SWP diversions, it will, as a practical matter, control the project. Federal control would directly undermine the Project's critical institutional mechanism, particularly the individual contracts that the state has made with petitioners and several other public water agencies through-

out the state for the delivery of specifically scheduled amounts of project water each year. Those contracts are based on state constitutional and statutory mandates that require full repayment of the state indebtedness incurred in constructing the project (*Joint Brief of Intervenors*, District Court Docket Item 111; note 4, *supra*).

Petitioners entered into their state water contracts with the understanding that state water law, rather than federal law, would control those diversions, as long as those diversions did not impair navigation. By allowing the U.S. Corps of Engineers to subordinate state laws in matters that extend beyond federal navigation requirements (Ptn. App., pp. 118-119), the Circuit Court opinion injects a major uncertainty into California's multi-billion dollar SWP, and, more specifically, into petitioners' respective water supplies.

That uncertainty is particularly disruptive because petitioners and scores of communities within their service areas have undertaken extensive financial and water supply responsibilities on the basis of the water delivery schedules set forth in the state water supply contracts (Jt. App., pp. 99a-112a). The Circuit Court opinion would transfer the basic authority over the Project's water delivery capability to a federal agency that has no responsibility for the State Water Project's operational or financial integrity. In addition, that agency can ignore the legal safeguards that petitioners have developed over the past twenty years in cooperation with the State's electorate, legislature, and judiciary to assure optimum use, reliable operation, responsible funding, and financial feasibility.

The Circuit Court's refusal to consider the well-defined Congressional policy of deferring to state water rights law is particularly insupportable in light of this Court's recent recognition of the history of Congressional intent in the field of federal-state jurisdiction over the allocation of waters, and its general deference to State water rights law, (*United*

States v. New Mexico, supra, 438 U.S. at 701-702, 98 S.Ct. at 3015; *California v. United States, supra,* 438 U.S. at 678-679, 98 S.Ct. at 3002-3003). Those two decisions clearly recognize that Congress considers water supply diversions as matters traditionally relegated to State law.

The Circuit Court opinion interprets *California v. United States* very narrowly. Indeed, it appears to limit that decision to "the context of federal *reclamation* projects". (Ptn. App., pp. 35-36.) That limitation manifests a serious misreading not only of *California v. United States,* but also of this Court's concurrent decision in *United States v. New Mexico*. The latter decision was not a Reclamation Act case, but it still recognized the same Congressional deference to State water law as did *California v. United States*. Furthermore, *California v. United States* itself cites a non-Reclamation Act statute, the McCarren Amendment, as "the most eloquent expression of the need to observe State water law." The McCarren Amendment subjects the United States to state court jurisdiction for general stream adjudication of water diversion rights (438 U.S. at 689, 98 S.Ct. at 3002. (Ptn. App., p. 140)).

Apparently, the Circuit Court also considers 37 other federal statutes deferring to State water law as essentially limited to reclamation projects (Ptn. App., pp. 33-36) and, therefore, inapplicable to a navigation statute. However, less than a third of those acts are Reclamation Act statutes. The relevant portions of those statutes are set forth on pages 131-151 of the Ptn. App., with asterisks identifying the Reclamation Act statutes.

3. The Circuit Court's Rejection of the Federal Policy Favoring State Water Rights Law Constitutes an Unfavored Implied Repeal.

The Circuit Court's rejection of the Congressional policy articulated in 38 federal statutes (Ptn. App., pp. 131-151) impliedly repeals a significant portion of that policy and, of course, partially repeals some of those statutes. For ex-

ample, Section 301(a) of the Water Supply Act of 1958 (Ptn. App., p. 145) states the following general policy applicable to all federal agencies:

> It is hereby declared to be the policy of the Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes and that the Federal Government should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects.

The Circuit Court opinion would impliedly repeal that statute, at least as it applies to navigable waters. It would transfer primary authority for regulating water supply diversions from navigable streams, to the Federal Government. Accordingly, it would preclude the states from exercising one of their primary responsibilities for developing navigable water supplies, namely the authority to allocate rights to the use of those supplies.

It is a cardinal principle of statutory construction that repeals by implication are not favored. As this Court stated in *United States v. Borden Co:*

> When there are two acts upon the same subject, the rule is to give effect to both if possible . . . The intention of the legislature to repeal 'must be clear and manifest . . .' There must be a positive repugnancy between the provisions of the new law, and those of the old. . . . (308 U.S. 188, 189, 60 S.Ct. 182, 188 (1939); See also *United States v. Batchelder,* 442 U.S. 114, 122, 99 S.Ct. 2198, 2203 (1929).)

There is, therefore, a judicial duty to give effect to both the old (1899 Act) and new (1958 Water Supply Act) statutes, absent a repugnancy between the statutes. (*United States v. Healey,* 160 U.S. 136, 146, 16 S.Ct. 247, 251 (1895); *United States v. Jackson,* 302 U.S. 628, 631, 58 S.Ct. 390, 392 (1938).)

4. The Circuit Court's Rejection of the Federal Policy Favoring State Water Rights Law Constitutes an Unfavored Preemption.

The Circuit Court's imposition of federal regulation over water supply diversions that do not burden future or prospective navigation would essentially preempt state water rights control of those diversions. The Circuit Court bases that preemption on the fact that the 1899 Act does not itself mention non-interference with state-authorized water supply diversion operations (Ptn. App. p. 36).

However, in analogous situations, involving other federal statutes, this Court has deferred to state law, where that deferral would not impair basic federal responsibilities, (*Linn v. United Plant Guard Workers,* 383 U.S. 53, 59-61, 86 S.Ct. 657, 661-662 (1966) (National Labor Relations Act, 29 U.S.C. § 141, *et seq.*); *Florida Lime and Avocado Growers,* 373 U.S. 132, 144, 83 S.Ct. 1210, 1218 (1963) (Federal Agricultural Adjustment Act, 7 U.S.C. § 601, *et seq.*)). This Court succinctly stated the underlying principle in *Florida Lime, etc., supra,* as follows:

> The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained. (373 U.S. at 142, 83 S.Ct. at 1217)

In applying this principle to analogous statutory interpretation issues involving the Labor Management Relations Act, this Court has also concluded:

> that the states need not yield jurisdiction "where the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . [o]r where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to act." (*Linn, supra,* 383 U.S. at 59,

86 S.Ct. at 661, quoting *San Diego Unions v. Garmon*, 359 U.S. 236, 243-244; 79 S.Ct. 773, 779 (1959).)

This Court has not required an express statutory statement in federal statutes of noninterference with State law in order to limit federal preemption. Instead, it has refused to infer federal statutory preemption of state law without an unambiguous Congressional mandate to that effect, particularly where the state law represents, as it does here, an exercise of historic State police power (383 U.S. at 59, 86 S.Ct. at 611; 373 U.S. at 146, 83 S.Ct. at 1219).

In the present case, the continued deference to state water rights law does not stand as an obstacle to the accomplishment of the basic purposes and objectives of the 1899 Act, so long as federal regulation of water rights diversions is limited to cases involving unreasonable interference with present or prospective navigation (*United States v. Rio Grande, supra*). Indeed, State water rights laws have coexisted with federal regulation of navigation for the entire 80-year life of the 1899 Act, without any significant conflict between the two regulatory schemes.

Even more importantly, the plaintiffs have not presented any evidence of Congressional intent to preempt the field of water rights law. Instead, there is ample evidence to the contrary, that Congress in fact intends to recognize and protect State water rights jurisdiction over water supply diversions from navigable waters in the absence of any substantial impairment of established navigable capacity.

B. The Circuit Court's Opinion Relies on a Strained Technical Interpretation of Section 10 That Does Not Further the Purpose of the 1899 Act.

The Ninth Circuit's opinion stretches the plain meaning of Section 10 of the 1899 Act (Ptn. App., pp. 27-28, 39) and thereby expands its scope beyond its intended purpose, in a manner that preempts existing Congressional policy. There is no sound reason for the preemption in either the Act itself, or in this Court's previous decisions.

In making this assertion, petitioners are not insisting on the narrowest possible definition of navigable capacity as the Circuit Court opinion charges. (Ptn. App., p. 28, fn. 24.) Neither do we dispute that Congress possesses broad power to protect navigation, and to subordinate State law to implement that power, as the opinion suggests. (Ptn. App., p. 38.) However, in the area of water diversion law, Congress has tempered its exercise of power by deferring to State water law in the absence of direct inconsistency with federal statutes. (*California v. United States, supra.*) The plain language of the 1899 Act is not inconsistent with that deferral, and the Circuit Court should not stretch the Act in order to make it inconsistent.

Furthermore, the fact that the 1899 Act does not explicitly mention noninterference with State water law is not controlling, as the opinion also suggests. (Ptn. App., p. 36.) That suggestion ignores the decisions of this Court described above, in analogous situations that limit federal preemption of State laws and implied repeal of federal statutes.

1. The Purpose of the 1899 Act Is to Prevent Unreasonable Obstructions to Navigation.

Congress enacted Section 10 of the 1899 Act to regulate the creation of obstructions to navigation caused by altering the physical structures[9] that enclose the Nation's navigable waterways. Since common law did not regulate those obstructions, Congress had been forced to enact legislation to protect navigation, which at that time represented a major percentage of the Nation's transportation system (*Willamette Iron Bridge Co. v. Hatch,* 125 U.S. 1, 8 S.Ct. 811 (1888); *Hubbard v. Fort,* 188 Fed. 987 (1911). 32 Cong. Rec. 1350-51 (1899)). Subsequent case law has added to the types of activities originally covered by the Act, non-

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[9]The term "physical structures" refers both to natural or artificial features, such as banks, beds, channels, and levees which define the boundary of specific navigable waters.

structural operations which substantially interfere with the navigable capacity needed to support recognized navigation (*Sanitary Dist. of Chicago v. United States, supra*).

Congress has divided Section 10 into three clauses. The first is a general prohibition on the creation of any obstruction "to the navigable capacity of any of the waters of the United States," unless "affirmatively authorized by Congress." The second clause prohibits construction of certain types of structures in navigable water without authorization by the Secretary of the Army. The third clause similarly prohibits excavating, filling or altering various types of structures that enclose water bodies, including harbors, canals or channels that contain navigable water.

Although the first clause of Section 10 prohibits obstructions to the navigable capacity of any of the waters of the United States without affirmative congressional authorization, the decisions of this Court have imposed on that concept a criterion of reasonableness. Thus in *Wisconsin v. Illinois, supra,* this Court stated that:

> The true intent of the Act of Congress was that *unreasonable* obstructions to navigation and navigable capacity were to be prohibited. . . . (278 U.S. at 413, 49 S.Ct. at 170, emphasis added.)

The criterion of reasonableness involves both policy and factual considerations. Policy considerations should obviously include the congressional policy, described above, of deferring to state water rights law whenever reasonable. That policy should be a permanent consideration in determining whether an activity constitutes an obstruction to navigable capacity, particularly under the first clause of Section 10. It seems eminently reasonable that water supply diversions regulated under state water rights law should be presumed not to be an obstruction to navigable capacity, in the absence of a factual showing of unreasonable burden on, or destruction of, present or prospective navigation.

The reasonableness criterion also involves factual considerations, in determining whether an activity such as the SWP water supply diversion constitutes an obstruction to navigable capacity. As this Court has previously stated:

> The question always is one of fact, whether such appropriation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact. (*United States v. Rio Grande Dam and Irrig. Co.*, 174 U.S. at 709, 19 S.Ct. at 777.)

Thus the criterion should include such factors as whether the activity would create substantial navigation burdens, present or prospective; or would cause hydraulic changes substantially greater than those that have occurred independently of the activity. In applying the reasonableness criterion to *de facto* water supply diversions regulated under state water laws, that same decision articulated the criterion in terms of whether the water supply activity would diminish the volume of water "to such an extent as to destroy its navigability" (*Id.*).

Consequently, water rights activities that do not fall within the second or third clauses of Section 10 should not fall within the regulatory ambit of the 1899 Act, absent an affirmative factual showing of unreasonable impairment of present or future navigation. The facts of this case certainly do not show an unreasonable actual or potential impairment of navigation. The only effects shown on navigable waters were the potential lowering,[10] at times, of water levels to varying degrees, and some flow reversals in channels that are naturally subject to flow reversals (Ptn. App., p. 27, n. 22; Jt. App., p. 95a).

Both effects are well within the amplitude of naturally occurring tidal variations. Mr. Hebert testified that the variations in water elevations caused by tidal action are between

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[10]Mr. Alfred Jones testified that Clifton Court Forebay allowed the State to operate the SWP Delta Pumping Plant "without incurring any level variations during low tides to the Delta" (R 98, lines 3-10).

three and three and one-half feet (Jt. Ptn., p. 212a), as compared to the maximum potential effect on water levels (caused by *both* the SWP Delta Pumping Plant and the Federal Tracy Pumping Plant) of one and one-half feet (Ptn. App., pp. 27, n. 22, 90).

Similarly, Mr. Hebert testified that flow reversals are inherent in the waters in question because they are "under the influence of the tidal variations at the Golden Gate" (Jt. App., p. 121a). The plaintiffs did not present any evidence controverting that testimony. Nor did they present any testimony that the variances caused any present or would cause any potential interference with navigation.

2. The Circuit Court Opinion Improperly Amends the Third Clause of Section 10.

The Circuit Court opinion, however, circumvents the reasonableness criterion of Section 10. It concludes that the SWP water diversions fall within the scope of the third clause of Section 10, and then *presumes* that that activity constitutes an obstruction to navigable capacity (Ptn. App., pp. 28, 39). Thus, the Circuit Court concludes that federal regulation attaches to nonstructural water supply activities that do not affect navigation in any meaningful way.

The opinion bases this conclusion on an interpretation of the third clause which eliminates the word "channel" from the statutory language. The limitation implicit in that word is readily apparent from the relevant portion of the third clause:

> . . . and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of . . . the *channel* of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same. (33 U.S.C. § 403, emphasis added.)

Previous decisions have applied the term "channel" in the context of the physical bed of a stream, bay or sound,

rather than to the waters which it encloses (*State of Alabama v. State of Georgia,* 64 U.S. 505, 513, 1859; *Yellowstone Pipe Line Co. v. Kuceynski,* 283 F.2d 415, 421 (9th CCA, 1960); *Village of Prairie DuRocher v. Schoening-Koenigsmark,* 248 Ill. 57, 59; 93 NE 425, 426 (1910); 93 C.J.S. Waters § 41).

Thus, modification of the "condition or capacity of the *channel*" of navigable water would require an alteration in the physical structure carrying the water. It does not encompass a change solely in the flow characteristics of the water carried by the channel. The Circuit Court opinion, however, assumes that Section 10 includes just that, and that the 1899 Act applies to every nonstructural modification of the water levels or other flow characteristic of a navigable stream. It makes that assumption independently of any effect on the physical structure through which the water flows, or on future or potential navigation (Ptn. App., pp. 39, 54).

The Circuit Court supports its generous interpretation of Section 10 by cases that involve either changes in a physical structure enclosing navigable waters, or substantial burdens on navigation. But those factors are not present in our case. The SWP diversions do not affect the channel of the Delta waterway from which they are taken. The levee gates through which those diversions are made were constructed pursuant to a Section 10 permit that was issued before this action was filed (Joint App., pp. 91a, 115a-118a). Furthermore, the State constructed those gates specifically to avoid changing the Delta channels (Ptn. App., p. 91, n. 31).[11]

a. *THE CHANGED CHANNEL CASES.*

Most of the cases on which the Court of Appeals relies involved situations where activities physically changed the structure of the bed underlying navigable waters (Ptn. App.,

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[11]The State also constructed as an artificial body of water, the Clifton Court Forebay to which the gates connect (Jt. App., p. 91a; Ptn. App., p. 50).

pp. 24, 31-33). Although these changes were not shown in every case to directly affect navigation, they easily fall within the plain language of the third clause of Section 10. For example, in *United States v. Republic Steel*, 362 U. S. 482, 80 S.Ct. 884 (1960), solid industrial wastes were deposited on the bed of a navigable channel so as to increase the height of that bed by four to nine feet. The consequent shoaling reduced channel depths below the 21-foot draft needed by vessels that normally used the channel, *Id.*, at 483.

The two *U.S. v. Moretti*, cases, *Moretti I*, 478 F.2d 418 (5th Cir. 1973) and *Moretti II*, 526 F.2d 1306 (5th Cir. 1976); *Weiszmann v. Corps of Engineers*, 526 F.2d 1302 (5th Cir. 1976); *U.S. v. Sexton Cove Estates, Inc.*, 526 F.2d 1293 (5th Cir. 1976); and *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970; cert. den. 401 U.S. 910 (1971)) were all cases where dredge and fill operations physically changed the bed underlying navigable waters. In *Moretti*, the defendant had deposited 400,000 cubic yards of earth into the channel bed, 526 F.2d at 1308; in *Weiszmann*, sediment had been deposited in a channel bed as a result of dredging a new canal, 526 F.2d at 1305; in *Sexton Cove*, defendant had constructed a new shoreline on a coastal sound, 526 F.2d at 1299; and in *Zabel*, eleven acres of tidelands were filled, 430 F.2d at 201.

The Circuit Court, in spite of the fact that each of the cases cited above involved physical alteration of a channel or shoreline, ignored that limitation and concluded that *Moretti I* established "beyond cavil that an alteration or modification of navigable waters is sufficient to trigger the permit requirements of Section 10," (Ptn. App., p. 32). The interpretation is particularly misplaced because *Moretti I* specifically limited its holding to "any *filling* of navigable waters" (478 F.2d at 429, n. 37; emphasis added).

The Circuit Court's reliance on *Hubbard v. Fort* (188 Fed. 987 (1911)) is similarly misplaced. That case also

involved a physical change of the bed underlying navigable waters (by the installation of an underwater pipeline). One aspect of that case, however, is of particular relevance. The court rejected federal preemption of a state law which prohibited the construction of the pipeline. (*Id.* at 989-92.) Although that factual situation differs from the factual situation in this case, *Hubbard* does indicate that in enacting Section 10, Congress did not intend to override all associated state interests. (*Id.* at 999.)

b. *NAVIGATION BURDEN CASES.*

The Circuit Court relied on two other types of cases for its expansive interpretation of Section 10. One type involves the factual situation where there is a clear demonstration of substantial impairment of commercial navigation. In the other type, this Court articulated a factual navigation impairment test for situations where the Attorney General initiates injunctive proceedings. Both types of cases involved a determination that obstructions to navigable capacity had been created, and thus an interpretation of the first, rather than the third, clause of Section 10.

(i) *The Great Lakes Cases.*

The Circuit Court's opinion places its primary reliance on two decisions of this Court that dealt with sewage dilution diversions from Lake Michigan, *Sanitary Dist. v. United States, supra,* and *Wisconsin v. Illinois, supra.* Not only were those diversions not based on state authorized and regulated water rights, but they also resulted in extensively documented impairment of major commercial navigation on at least four of the Great Lakes. They reduced the annual Great Lakes shipping capacity by over three million tons, valued at the time at a cost of 88 cents per ton. That impairment affected seven states, an international treaty with Great Britain, four hundred harbors, and a hundred federally

improved channels (278 U.S. at 407-409, 49 S.Ct. at 167-179; 266 U.S. at 423, 426, 45 S.Ct. at 177-179).[12]

(ii) *United States v. Rio Grande.*

The Court of Appeals also relied on *United States v. Rio Grande, supra.* That decision, although enjoining storage of water on a non-navigable upstream portion of the Rio Grande River, did give serious consideration to the Congressional policy of deferring to State water rights law.

This Court went out of its way in *Rio Grande* to recognize that activities which otherwise would have only local significance and which normally present no federal issues should only be regulated where actual obstructions to needed navigable capacity are demonstrated. The Court stated:

> It does not follow that the courts would be justified in sustaining any proceeding by the attorney general to restrain any appropriation of the upper waters of a navigable stream. The question always is one of fact, whether such appropriation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact. (174 U.S. at 709, 19 S.Ct. at 777).

Rio Grande is particularly relevant to the present case. It specifically addressed the relationship of federal navigation interests to state water rights law by illustrating the statement quoted above, with the following example:

> In the course of the argument, this suggestion was made, and it seems to us not unworthy of note, as illustrating this thought. The Hudson River runs within

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[12]Petitioners submitted to the Court of Appeals for Judicial Notice, excerpts from the following public documents that are on file with this Court in *Sanitary District v. U.S., supra*:

1. Pages 92 and 94 and 118 and 119 of the General Index to the Transcript of Record, Volume A
2. Index pages I to V and pages 87 to 117 of the Brief for Appellee United States
3. The Amicus Curiae Brief of the Lake Carriers Association.

Petitioners hereby request that this Court take judicial notice of those documents which are in its files.

> the limits of the state of New York. It is a navigable stream and a part of the navigable waters of the United States, so far at least as from Albany southward. One of the streams which flows into it and contributes to the volume of its waters is the Croton river, a non-navigable stream. Its waters are taken by the state of New York for domestic uses in the city of New York. *Unquestionably the state of New York as a right to appropriate its waters, and the United States may not question such appropriation, unless thereby the navigability of the Hudson be disturbed.* On the other hand, if the state of New York should, even at a place above the limits of navigability, by appropriation for any domestic purposes, diminish the volume of waters, which, flowing into the Hudson, make it a navigable stream, to such an extent as to destroy its navigability, undoubtedly the jurisdiction of the national government would arise and its power to restrain such appropriation be unquestioned; and, within the purview of this section it would become the right of the attorney general to institute proceedings to restrain such appropriation. (174 U.S. at 709, 19 S.Ct. at 777, emphasis added)

If the Circuit Court's interpretation of the 1899 Act is sustained, this quotation will no longer be the law. Under the Circuit Court's theory, the United States could have challenged New York's appropriation even if the navigability of the Hudson River had remained undisturbed, as long as there was *any* alteration of the condition or capacity of the navigable stream. Since storage of water in a reservoir automatically alters downstream river flows, the Circuit Court's interpretation of the 1899 Act automatically subjects all dams located on tributaries of navigable waters to its permitting procedures and regulatory control. This clearly shows the extent to which the Circuit Court's holding alters the traditional federal "hands-off" policy with respect to local water projects and modifies the underlying basis for the *Rio Grande* decision.

Rio Grande clearly articulated the policy which existed when Congress adopted the 1899 Act and which Congress

has continued to follow. That policy is that federal statutes should not be construed to impose federal regulatory control over state regulated water rights diversions, unless those diversions alter flows in a manner that unreasonably and substantially impairs the stream's capacity to support established navigation. The Circuit Court opinion failed to apply this policy and thereby directs the United States to involve itself in any diversion of water from a navigable stream.

III.

THE CIRCUIT COURT OPINION IMPROPERLY REFUSED TO RECOGNIZE THE ADEQUACY OF THE SECTION 10 PERMIT ISSUED TO THE STATE PRIOR TO THIS ACTION.

If the challenged SWP water supply diversion operations should fall within the ambit of Section 10, they are, in fact, already covered within the scope of the Section 10 permit[13] that the Corps of Engineers issued to the State in June 1967. The Corps issued the Permit:

> . . . to cut the westerly levee of West Canal, for the purpose of constructing an inlet structure for Clifton Court Forebay, Contra Costa County, as shown on the reverse of this notice." (Jt. App., p. 119a; State Exh. 25, *supra*)

The State made the levee cut and constructed the control structure in order to provide the diversion works for the SWP Delta Pumping Plant, by way of Clifton Court Forebay (Ptn. App., pp. 70-71). Condition (f) of the Permit specifically reserves to the Secretary of the Army authority to require the State:

> . . . to remove or alter the structural work or obstructions caused thereby without expense to the United

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[13]The Permit was designated No. 4101. It was introduced as Plaintiffs' Exhibit 24 and is set out, along with its related public notice, on pp. 115a-119a of the Joint App.

> States, so as to render navigation reasonably free, easy and unobstructed. (Jt. App., p. 117a, para. (f).)

The Permit also conditions that authority on a determination by the Secretary of the Army that the levee cut and the control structure:

> . . . shall cause unreasonable obstructions to the free navigation of said water. (*Id.*)

Thus, the State's pre-existing Section 10 permit expressly preserves the federal navigation interest as it had been understood for the first 67 years of the 1899 Act. The Circuit Court, however, rejected Permit 4101 as adequate Section 10 compliance (Ptn. App., pp. 50-51). The apparent basis for that rejection is that the permit does not authorize construction of the Delta Pumping Plant itself (Ptn. App., p. 50). That plant, of course, was not constructed in navigable waters and was constructed solely at State expense (Jt. App., pp. 89a, 91a-93a). Nevertheless, the opinion recognizes that Permit 4101 preserves the Corps' authority to prevent unreasonable obstructions to navigation both by its terms, and under Corps' Regulation 33 CFR 325.7(a)(1978) (Ptn. App., p. 51, n. 37).

Obviously, the Circuit Court requires that a Section 10 permit must regulate more than obstructions to navigation. Indeed, it even raises the possibility of federal abolition of the Delta Pumping Plant altogether (*Id.*). But, even if the SWP Delta diversion operations did fall within the ambit of Section 10, the construction of state facilities on dry land clearly does not. There is, therefore, no justifiable basis for the Circuit Court's refusal to recognize the adequacy of Permit 4101 as discharging all of the State's Section 10 responsibilities arising from its SWP water diversion operations.

CONCLUSION.

The Circuit Court opinion invokes an 80-year old statute as a vehicle for expanding federal litigation over, and federal regulation of, matters traditionally relegated to state law.

That expansion reflects not only a misreading of Congressional intent in 1899, it also reflects a misreading of Congressional intent in 1980. This is, after all, a time of public disenchantment with the proliferation of federal litigation and regulation.

The Circuit Court's expansion of the 1899 Act also reflects a misreading of the decisions of this Court. Those decisions have carefully, and recently, articulated a clear criteria for determining the existence of a private right of action under federal statutes. However, the Circuit Court has ignored important portions of that criteria and consequently has superimposed its view of "utility" on that expressed by Congress. The result will be more, rather than less, litigation before the federal courts, over matters that would otherwise be litigated in the state courts.

Similarly, the decisions of this Court have consistently recognized the substantial Congressional policy of allowing the states to allocate their water supplies under state law. The Circuit Court opinion would, on the other hand, superimpose a new level of federal control that is essentially unrelated to the purpose of the 1899 Act. This new level of control is, however, based on a strained interpretation of Section 10 of the Act, that does not provide any additional tangible protection for the federal navigation servitude.

For these reasons, we therefore urge this Court to reverse the judgment and opinion of the Circuit Court and order dismissal of this action.

Respectfully submitted,

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APPENDIX.

Pertinent Sections of Rivers and Harbors Act of 1899.

Section 10, Rivers and Harbors Act of 1899:

Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in.

"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same. 33 U.S.C. § 403.

Section 12, Rivers and Harbors Act of 1899.

Penalty for wrongful construction of bridges, piers, etc.; removal of structures.

Every person and every corporation that shall violate any of the provisions of sections 401, 403, and 404 of this title or any rule or regulation made by the Secretary of the Army in pursuance of the provisions of section 404 of this title shall be deemed guilty of misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or

by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States. 33 U.S.C. § 406.

Section 17, Rivers and Harbors Act of 1899.

Duty of United States attorneys and other Federal officers in enforcement of provisions; arrest of offenders.

The Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of sections 401, 403, 404, 406, 407, 408, 409, 411, 549, 686, and 687 of this title; and it shall be the duty of United States attorneys to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of the Army or by any of the officials hereinafter designated, and it shall furthermore be the duty of said United States attorneys to report to the Attorney General of the United States the action taken by him against offenders so reported, and a transcript of such reports shall be transmitted to the Secretary of the Army by the Attorney General; and for the better enforcement of the said provisions and to facilitate the detection and bringing to punishment of such offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of the Army, and the United States collectors of customs and other revenue officers shall have power and authority to swear out process, and to arrest and take into custody, with

or without process, any person or persons who may commit any of the acts or offenses prohibited by the said sections, or who may violate any of the provisions of the same: *Provided,* That no person shall be arrested without process for any offense not committed in the presence of some one of the aforesaid officials: *And provided further,* That whenever any arrest is made under such sections, the person so arrested shall be brought forthwith before a commissioner, judge, or court of the United States for examination of the offenses alleged against him; and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States. 33 U.S.C. § 413.

No. 79-1502

IN THE

Supreme Court of the United States

October Term 1980

KERN COUNTY WATER AGENCY, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, SANTA CLARA VALLEY WATER DISTRICT, AND TULARE LAKE BASIN WATER STORAGE DISTRICT,

Petitioners,

vs.

SIERRA CLUB, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Reply Brief of Petitioners.

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Reply Brief of Petitioners.

Introduction.

The petitioners, four public water agencies that rely on the water supply diversion that is the subject of this action, hereby reply to the briefs for respondents and *amici curiae* National Wildlife Federation and Operation Wildlife. Those briefs attempt to justify major changes in the manner in which Section 10 of the Rivers and Harbors Act of 1899 (the "1899 Act")[1] has been administered for three-quarters

[1]The term 1899 Act, as used in this brief, also refers to its predecessor act, adopted in 1890, which is discussed with respect to private rights of action.

of a century. The proposed changes would add a private right of enforcement, as well as a major expansion of administrative controls.

Respondents and *amici* seek to exploit that statute by transforming its historical role of federal protection for waterborne commerce, to one of general control over state regulated water supply operations.

I.

FAILURE TO ESTABLISH A PRIVATE RIGHT OF ENFORCEMENT.

A. The Sierra Club's Argument With Respect to Private Rights of Action Is Historically Unsound and Improperly Distinguishes the Recent Precedents.

The Sierra Club[2] brief accepts the position of petitioners and federal respondents with respect to the proper method for determining if a federal statute creates a private right of action. Hence, none of the parties are supporting the lower court's reasoning on that issue. Instead, the arguments properly revolve around this Court's recent opinions in *National Railroad Passengers Corp. v. National Association of Railroad Passengers* (the "*Amtrak* case"), 414 U.S. 453, 94 S.Ct. 690 (1974); *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S.Ct. 2479 (1979); and *Transamerica Mortgage Advisors Inc. (TAMA) v. Lewis*, 444 U.S. 11, 100 S.Ct. 242 (1979), which have established the criteria to be used to determine whether Congress intended to create a private right of enforcement.

Predictably, because the guidelines established by the recent cases augur strongly against a private right of action,

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[2]Our references to Sierra Club include the other plaintiffs and *amici* National Wildlife Federation and Operation Wildlife.

the Sierra Club devotes a majority of its brief to the historical backdrop of the 1899 Act's adoption, in an attempt to demonstrate that the usual rules of statutory construction should not apply. In conducting its historical analysis, however, the Sierra Club has committed a fundamental error which renders its effort logically flawed. It has misread the pre-1890 federal cases as having created private rights to enjoin navigational interferences under federal law. This is an incorrect reading of the cases and seriously affects the remainder of the Sierra Club's historical argument.

1. The Pre-1890 Federal Cases Do Not Support the Sierra Club's Historical Interpretation of the 1899 Act.

The Sierra Club's efforts to create a private right of action begin with a discussion of about a dozen pre-1890 federal and state cases which established the common law doctrine that a private party could obtain an injunction against a navigational obstruction if particularized injury (*i.e.*, a private nuisance) could be demonstrated. (Sierra Br. 18-29). Sierra Club then sets forth the premise of its argument, as it involves these pre-1890 cases, as follows:

> As seen above, the pre-1890 decisions of this Court had clearly established (1) that a private action would lie to enjoin an unlawful obstruction to navigation, but (2) that an obstruction authorized by state law would not be deemed unlawful in the absence of a specific congressional prohibition, and further (3) that specific congressional action would also be necessary to authorize any challenge to such an obstruction by the Attorney General on behalf of the United States. The statute which Congress enacted against this background expressly addresses the latter two issues but says nothing about the first, and *the question has accordingly been presented whether Congress's silence on that score implies an intent to leave the existing remedial*

> *scheme in place or to change the law in that regard by abrogating the established remedial rule.* [Sierra Br. 30-31; emphasis added.]

The only logical inference that flows from this quotation is that the Sierra Club believes that the pre-1890 cases established a federal question cause of action for nuisance always maintainable in the federal courts and that petitioners are contending that enactment of the 1899 Act eliminated this preexisting federal right of action. This characterization of petitioners' position is repeated at page 36 of the Sierra Club brief where it is argued that the Congressional debates:

> provide a clear refutation of the notion, on which both the federal respondents and the intervening water agencies have principally based their argument on this whole issue, that the statutory enforcement of the Act by the Attorney General was intended as an implicit abrogation of the remedial rights of private parties.

The twice used term "abrogate" is defined by Webster's as "to abolish" or "do away with." In other words, it connotes the prior existence of a thing or right. But, the Sierra Club is simply wrong in contending that the pre-1890 cases had created a private party right to bring suit under federal law for injunctive relief against obstructions to navigation. The issue is not whether Congress intended to abrogate an existing right in 1890, but whether it intended to create a new right by the legislation.

The Sierra Club cites ten United States Supreme Court cases for its contention that a right to sue in the federal court for navigational interference existed in 1890. But in each of those cases, the Court was either (a) applying local law in a diversity situation, (b) accepting jurisdiction because a State was a party, or (c) rejecting a contention that a federal statute provided a basis for relief. The accuracy of this statement is demonstrated by even the most cursory

reading of *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 8 S.Ct. 811 (1888).

That case catalogues and describes each of the cases cited by the Sierra Club and summarizes the state of the law in 1888 as follows:

> The power of congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, is not questioned. But until it does pass some such law, there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers, unless it be the maritime law, administered by the courts of admiralty and maritime jurisdiction. No precedent, however, exists for the enforcement of any such law; and if such law could be enforced, (a point which we do not undertake to decide,) it would not avail to sustain the bill in equity filed in the original case. There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the states. Such obstructions and nuisances are offenses against the laws of the states within which the navigable waters lie, and may be indicted or prohibited as such; but they are not offenses against United States laws which do not exist; and none such exist except what are to be found on the statute book. Of course, where the litigant parties are citizens of different states, the circuit courts of the United States may take jurisdiction on that ground, but on no other. This is the result of so many cases, and expressions of opinion by this court, that it is almost superfluous to cite authorities on the subject. We refer to the following by way of illustration: *Willson v. Creek Co.*, 2 Pet. 245; *Pollard's Lessee v. Hagan*, 3 How. 229; *Passaic Bridge Cases*, 3 Wall. 782; *Gilman v. Philadelphia*, *Id.* 724; *Pound v. Turck*, 95 U.S. 459; *Escanaba Co. v. Chicago*, 107

> U.S. 678, 2 Sup.Ct. Rep. 185; *Cardwell v. Bridge Co.*, 113 U.S. 205, 5 Sup.Ct. Rep. 423; *Hamilton v. Railroad*, 119 U.S. 280, 7 Sup.Ct. Rep. 206; *Huse v. Glover*, 119 U.S. 543, 7 Sup.Ct. Rep. 313; *Sands v. Improvement Co.*, 123 U.S. 288, 8 Sup.Ct. Rep. 113; *Transportation Co. v. Parkersburg*, 107 U.S. 691, 700, 2 Sup.Ct. Rep. 732. The usual case, of course, is that in which the acts complained of are clearly supported by a state statute; but that really makes no difference. Whether they are conformable, or not conformable, to the state law relied on, is a state question, not a federal one. The failure of state functionaries to prosecute for breaches of the state law does not confer power upon United States functionaries to prosecute under a United States law, when there is no such law in existence. [125 U.S., at 8-9, 8 S.Ct., at 815].

What is clear from the *Willamette* case is that the Sierra Club, in 1890, could not have brought this non-diversity case against the State of California in the federal courts. When properly viewed in this light, the question becomes, as it was articulated in petitioners' opening brief, whether Congress intended to create a *new* private right of action in the federal courts. The issue is not, as the Sierra Club attempts to frame it, whether Congress intended to eliminate an existing federal remedy.

2. The Recent Supreme Court Cases Are Applicable and Relevant to the 1899 Act.

Petitioners will not reiterate the statutory interpretation discussion contained in their opening brief. However, several responses to the Sierra Club's brief are required. The bulk of that brief is devoted to the legislative history of the 1899 Act, and this aspect will be addressed below. However, the legislative history review must be put into perspective. It is not the primary tool for statutory interpreta-

tion. The language of the statute itself must be examined first. *Touche Ross Co. v. Redington*, 442 U.S. 667, 689, 99 S.Ct. 2479, 2485 (1979).

Petitioners' opening brief noted that the *Amtrak* and *TAMA* cases, *supra*, hold that when a statute expressly provides a particular remedy, the courts must be chary of reading others into it. (*TAMA v. Lewis*, 444 U.S. at 19-20, 100 S.Ct. at 247). The Sierra Club attempts to distinguish the *Amtrak* case by arguing that it involved different statutory terminology (Sierra Br. 10, fn.). While it is true that each of the relevant cases involves varying statutory wording, the principle of the *Amtrak* case has been applied to a wide variety of statutes and can and should be applied in this case. Application of the *Amtrak* principle must lead to an initial determination that Congress intended exclusive enforcement of the 1899 Act to rest with the Department of Justice. (See Ptrs. Br. 12-13).

The Sierra Club urges the Court to use *Allen v. Board of Elections*, 393 U.S. 544, 89 S.Ct. 817 (1969), as substitute for the *Amtrak* analysis. This would be improper as *Allen* was not a case primarily decided by reference to enforcement language. As noted in *Cannon v. University of Chicago*, a private right of action was found to exist in the *Allen* case because the substantive sections of the 1965 Voting Rights Act described a special class to be benefited (441 U.S. at ...., 99 S.Ct. at 1954). This is in stark contrast to the 1899 Act which generally proscribes conduct with no reference to a benefited class.

Surprisingly, after citing the *Allen* decision, which turned on the language of the substantive clauses of the Voting Rights Act in spite of the fact there were specific remedial sections in that statute, the Sierra Club next attacks our reliance on the *Cannon* case because, in its view, where a statute contains a specific remedial scheme, its substantive

provisions are not the proper focus of analysis (Sierra Br. 15). In addition to being proven incorrect by the *Allen* case, this proposition won't stand logical scrutiny. Even where a remedial scheme exists, the substantive language can be a valuable checkback to see if the inferences derived from a review of the remedial provisions are supported or weakened. Such is the case with the 1899 Act. Its substantive provisions, which are general prohibitions of conduct, with no focus on any individual or group, support the conclusion reached from the language of the remedial sections that private enforcement of the Act was not intended. So *Cannon* is very relevant to the issues under consideration.

3. The Legislative History of the 1899 Act Does Not Support a Finding That a Private Right of Action Was Intended.

Once it is determined that the statutory interpretation standards discussed in our opening brief are relevant, one can return to the legislative history. But this return is with a different perspective from that contained in the Sierra Club's brief. First, one must find "persuasive evidence of a contrary legislative intent" before the interpretation flowing from the statutory language can be overcome. *TAMA v. Lewis*, 444 U.S. at 20, 100 S.Ct. at 247. Second, the legislative history is *not* examined to ascertain whether the 1890 Congress intended to abrogate an existing private federal right (since, contrary to the Sierra Club's position, one did not exist), but to ascertain whether, in spite of the language used by Congress, there is persuasive evidence that a new private federal action was being created.

The Sierra Club brief contains truncated excerpts from the Senate debates in 1890. However, a full reading of 21 Cong.Rec., pp. 8602-8608 is needed to obtain the full flavor of what Congress was considering. The participating Senators were totally concerned with what powers should be

granted to the Secretary of War. The focus of the debate centered on what degree of administrative authority should be provided and whether criminal sanctions should be included. The quotation from the remarks of Senator Vest (Sierra Br. 37), which the Sierra Club characterizes as an eloquent exposition of the need for public enforcement, was, in fact, an eloquent plea for broad governmental powers since private suits were ineffective. As Senator Vest stated:

> The only power they respect in this country is the power of the General Government. The only way you can reach them is through the federal power. [21 Cong.Rec. 8603].

Petitioners believe that the tenor of the entire debates demonstrates that the Senate specifically intended to grant exclusive authority in the Secretary of War to administer and enforce this new Act which was being enacted to create the federal authority which the *Willamette* case found lacking. But the best the Sierra Club can hope to gain from these debates is an argument that Congress didn't even consider the subject. This, however, is a far cry from the requirement that persuasive evidence of legislative intent must be found to overcome the interpretation flowing from the statutory language.

B. The Sierra Club's Other Contentions With Respect to Private Rights of Action Are Without Merit.

The bulk of the Sierra Club's argument involves statutory interpretation and legislative history. However, several other points warrant a brief reply.

1. The Sierra Club's reliance on the post-1890 cases is unpersuasive. (Sierra Br. 47-60). The totality of the cases cited simply show the magnitude of the split in authority on this issue throughout the Circuits. The cases denying a private right of action can not be distinguished by inferring

they are dicta or involve other sections of the Act permitting exclusively criminal enforcement. (Sierra Br. 53-54). For example, the section of the 1899 Act involved in *City of Evanville v. Kentucky Liquid Recycling*, 604 F.2d 1008 (7th Cir. 1979) and *Connecticut Action Now Inc. v. Roberts Plating*, 457 F.2d 81 (1972) has been held to be enforceable through injunction although the enforcement authority is pursuant to Section 17 of the 1899 Act (33 USC Sec. 413) rather than Section 12 (33 USC Sec. 406). (See discussion in the *Connecticut Action Now* opinion, 457 F.2d at 88.) Therefore, the holdings in these cases rejecting private enforcement are highly relevant.

2. The Sierra Club's effort to dismiss the importance of the enforcement language in Section 17 of the 1899 Act (33 USC Sec. 413) because it allegedly refers "exclusively to the criminal prosecutions" authorized by the Act (Sierra Br. 16, fn.) cannot withstand close scrutiny. Section 17 says "the Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of" *all relevant sections of the Act, including Section 12 (33 USC Sec. 406), the Section which specifically authorizes injunctive relief.* As the Second Circuit stated in *Connecticut Action Now*:

> This instruction is not limited in wording to criminal prosecutions but on its surface concerns all "legal proceeding necessary to enforce" the statute. This would ordinarily cover injunctions as well as criminal process. [457 F.2d at 89].

3. The Sierra Club states that private enforcement should be authorized to enable them to sue the United States. (Sierra Br. 66-68). This plea actually cuts against its position. This Court's primary task is to ascertain legislative intent. Given the well-known attitude of 19th Century Congresses and courts towards sovereign immunity, it is hard to imagine a conscious Congressional decision to authorize

private suits against the sovereign without substantial controversy and debate. There is nothing in the legislative history which raises the slightest inference that such suits were contemplated. In the absence of such historical evidence, granting a remedy based on desirability arguments, such as this, is not the function of the courts. *Touche Ross v. Redington*, 442 U.S. at 575-76, 99 S.Ct. at 2489.

4. Finally, the Sierra Club erred in challenging our characterization of this case as one traditionally relegated to state law. (Sierra Br. 69-70). Neither the complaint nor the evidence adduced at trial indicated any interference with transportation of people or goods. The entire thrust of the plaintiffs' case below involved water quality, the environment, and fish and wildlife matters. These are areas traditionally relegated to state law. The true purpose of this litigation is candidly stated in the closing sentence of the National Wildlife Federation's amicus curiae brief:

> If Section 10 were construed otherwise, as petitioners urge, the Corps might well find itself powerless to prevent a state water project which had disastrous environmental consequences from the federal point of view, but which had only marginal effects on navigation [Nat. Wild. Br. 28-29].

In other words, the Ninth Circuit opinion should be upheld to authorize federal intervention into traditionally state law issues even though no transcendent federal navigation interest is involved.

II.

FAILURE TO JUSTIFY AN UNNECESSARY MAJOR EXPANSION OF SECTION 10 PERMIT JURISDICTION.

The briefs for respondents and *amici* attempt to legitimize a disturbing and unnecessary expansion of administrative regulatory jurisdiction over local water supply allocations.

That expansion is of critical importance to petitioners independently of the private right of enforcement question, because the Corps of Engineers has now invoked that additional jurisdiction in its 1899 Act regulations (33 CFR §322.3, July 1, 1980). Furthermore, the Corps is currently processing an application for a Section 10 "operating" permit for the water diversion challenged in this proceeding.[3] Without a clear rejection of the lower courts' expansion of Section 10 permit jurisdiction over water supply diversions, the Corps may continue to assert the authority to impose that jurisdiction even if this Court rules that Section 10 does not include a private right of enforcement.

The briefs of respondents and *amici* attempt to support expansion of Section 10 permit authority to water supply operations outside of navigable waters by misstating our position on the scope of Section 10 regulatory jurisdiction. In addition, they rely on a mistaken assumption that the threshold for permit jurisdiction under the first clause of Section 10 is the same as the threshold for similar jurisdiction under the second and third clauses of that section.

A. The Briefs of Respondents and Amici Propose a Disturbing Expansion of Federal Regulatory Activities.

The respondents' assertion that the petitioners seek modification of "the scheme clearly set out in Section 10 of the 1899 Act" (Fed. Br. 14), represents a disturbing example of Orwellian "double-think". On the contrary, it is the respondents, rather than the petitioners, that are proposing a major departure from the manner in which Section 10 had been administered for at least 74 years.

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[3]The State of California filed the application under compulsion of the District Court's injunction implementing its 1975 Decision (Fed. Br. 8, n. 10).

In effect, the respondents seek ratification of the Corps of Engineers' April 3, 1974 amendment of its Section 10 regulations (33 CFR §209.120; 39 FR 12118).[4] That amendment added the following phrase to the previous description of activities subject to Section 10 permit jurisdiction:

> . . . any other work affecting the course, location, condition or capacity of such waters [33 CFR §209.120(b)(2)].

Until then, the Corps' Section 10 permit jurisdiction was limited to construction of facilities described in the second clause of Section 10 and to:

> . . . excavation or fill in navigable waters [§209.120(b)(1)(b); July 1, 1973].

Thus the respondents, after three-quarters of a century of interpreting Section 10 permit jurisdiction as limited to the express provisions of the second and third clauses of that section, are now attempting to expand that jurisdiction by eliminating the term "channel" from the third clause of Section 10; by adding automatic permit jurisdiction over all possible activities that could only fall within the first clause of Section 10; by circumventing the rule established by this Court in *United States v. Rio Grande*, 174 U.S. 690, 709, 19 S.Ct. 770, 777; and by ignoring well-established Congressional policy.

Even more disturbingly, respondents now seek to validate that expansion of federal regulatory jurisdiction, in an action that seeks redress on recreational, commercial fishing, duck hunting, water quality and water supply issues, rather than redress for interference with waterborne commerce. Indeed, the briefs clearly indicate that the purpose of the suit is

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[4]Copies of the relevant sections of the 1974 amendment and of the preexisting regulations are set forth in the appendix to this reply.

"to prevent a state water project" which has "only marginal effects on navigation" (Nat. Wild. Br. 29).

Respondents seek that expansion of permit jurisdiction on the basis of hydraulic variations that do not pose any threat to either present or prospective navigation; and which, in fact, fall within historical variations that occur independently of the challenged water supply diversion (Pet. Br. 39, 40). Furthermore, the variations on which the District Court relied grossly overstate the changes attributable to that diversion because they include the effects of substantial federal project diversions which the Circuit Court exempted from the Corps' operational permit jurisdiction (Ptn. App. 41-49, 88-91).

Finally, the respondents seek to validate new permit jurisdiction to regulate diversion operations in a situation where those operations are already extensively regulated under state water supply allocation and environmental protection laws; and where those operations control the water supply for over half the State's population (Pet. Br. 2-5). Thus, if this Court recognizes respondents permit jurisdiction over the challenged diversion, the Corps of Engineers will establish jurisdiction over State water allocations and thus over a major state water supply project, even though that diversion has, at most, only a marginal effect on navigation (Nat. Wild. Br. 29).

That jurisdiction would clearly reverse the existing presumption established by Congress and recognized by the decisions of this Court, that nonstructural water supply diversions regulated under state water allocation laws, do not impair federal interests in the absence of a showing of substantial interference. Instead, nonstructural water supply diversions from navigable streams would be presumed to obstruct navigable capacity, and would require federal operating permits at the discretion of the Corps of Engineers.

B. The Briefs of Respondents and Amici Misstate Petitioners' Position on the Regulatory Jurisdiction of Section 10 of the Rivers and Harbors Act of 1899.

The briefs of respondents and *amici* misstate our position on the Corps of Engineers permit jurisdiction. We are not seeking to reduce the historical Section 10 permit jurisdiction as those briefs state (*e.g.* Fed. Br. 10, 14, 26). We do recognize that the Corps of Engineers has automatic permit jurisdiction under the second and third clauses of Section 10. We certainly recognize that the State was required to obtain a Section 10 permit from the Corps of Engineers when it modified Delta channels by constructing the diversion gates to Clifton Court Forebay (Pet. Br. 46-47). Furthermore, we recognize that the Corps has continuing jurisdiction over the operation of those gates "so as to render navigation reasonably free, easy and unobstructed" (Jt. App. 117a).

We also recognize that the Government has regulatory jurisdiction under the first clause of Section 10, over activities not covered by the second or third clauses. Nevertheless, that jurisdiction exists only under certain conditions, and does not include automatic permit jurisdiction.

Our basic position is, of course, that the challenged water diversion does not now fall within any of the clauses of Section 10.

1. The Diversion Is Not a Third Clause Activity.

We have consistently argued that the challenged diversion is not the type of activity that Congress intended to regulate by operational permit controls under Section 10, in the absence of a tangible demonstration of unreasonable impairment of navigable capacity. More specifically, the diversion activity which respondents seek to regulate is *not* plainly forbidden by the third clause of Section 10 as the respon-

dents argue (*e.g.* Fed. Br. 34). It involves neither the construction of a structure within navigable waters, nor modification of a structure that confines navigable waters.

We do not agree that the word "channel" can be eliminated from that clause in the absence of Congressional action as the respondents propose. As this Court has recently reiterated, statutory construction must begin with the language of the statute (*Diamond v. Chakrabarty*, ... U.S. ...., 100 S.Ct. 2204, 2207 (1980); *Perrin v. United States*, ... U.S. ...., 100 S.Ct. 311, 314 (1979)). In their ordinary meaning, the activities listed in the third clause of Section 10 are commonly limited to those activities that modify the natural or manmade structures that confine navigable waters.

The respondents reply that the inclusion of the word "course" expands that clause to include water diversions that do not affect the physical structure confining the water body. They argue that the word "course" relates to "waters" rather than to streambeds (Fed. Br. 29). However, that argument ignores the plain meaning of the word "course" when used in the context of a river or other body of water. For example, Black's Law Dictionary clearly distinguishes between "course" and "current" in defining the phrase "course of a river":

> The course of the river is a line parallel with its banks; the term is not synonymous with the 'current' of the river. *Attorney General v. Railroad Co.*, 9 N.J.Eq. 550. [Black's Law Dictionary, Rev. Fourth Ed., 1976, p. 424.]

In addition, the respondents attempt to restrict this Court's ruling in *Oklahoma v. Texas*, 258 U.S. 574 (1922). That ruling did not limit the term "channel" to the thread of the navigable current as respondents propose (Fed. Br. 30). Instead, it defined the channel in question as the area "ex-

tending from one cut bank to the other, which carries the water in times of a substantial flow'', 258 U.S. at 594, thus reaffirming that the term ''channel'' connotes a structure, rather than a current.

The respondents also attempt to justify the *de facto* removal of the term ''channel'' from the third clause by suggesting that Section 10 would not otherwise ''cover reductions in the capacity of a stream to carry boats caused by water diversions'', (Fed. Br. 30). But that suggestion ignores the protection provided by the first clause of Section 10 against obstructions that substantially interfere with navigable capacity within the limits where navigation is a recognized fact, *United States v. Rio Grande, supra.*

2. The Diversion Is Not a First Clause Activity.

Contrary to respondents' assertions, we have also consistently argued that the factual situation now before the Court does not constitute an obstruction to navigable capacity within the meaning of the first clause of Section 10 (Fed. Br. 32; Pet. Br. 43-46). More particularly, we described in the brief we submitted to the Circuit Court the reasons why the Record does not support the District Court's conclusion that the challenged diversion obstructs navigable capacity. (Intervenors-Appellants' Brief to Court of Appeals, June 21, 1976, pp. 37-46.)

Should this Court reject the Circuit Court's broad reading of the third clause of Section 10, the respondents would have this Court recognize presumptive permit jurisdiction over the challenged water diversions, on the basis of the first clause of that section (Fed. Br. 32; Sierra Br. 78, 79). However, regulatory jurisdiction under that clause, as described below, differs importantly from that under the third clause. Indeed, this Court has established a specific rule of

substantial interference for the first clause in *United States v. Rio Grande, supra.*

The District Court misapplied that rule by drawing a defective and superficial analogy with *Sanitary District of Chicago v. United States,* 266 U.S. 423, 45 S.Ct. 177 (1924) (Ptn. App. 86, 87). That decision involved extensive and well documented impairment of commercial navigation; hydraulic variations that clearly exceeded historical variations; pre-existing *structural* permits; and an activity that did not involve the Congressional presumption of deference to state water supply allocations (Fed. Br. 39; Pet. Br. 43).

C. The Respondents Mistakenly Assume the Same Regulatory Threshold for All of the Section 10 Clauses.

The respondents and *amici* fail to recognize that the threshold for regulatory jurisdiction over activities covered by the first clause of Section 10 is not the same as the threshold for permit jurisdiction over activities covered by the second and third clauses. Consequently, they assume that all activities that could conceivably be classified as obstructions to navigable capacity automatically fall within the Corps of Engineers' permit jurisdiction (Fed. Br. 30).

That assumption is defective because the first clause of Section 10 does not impose automatic administrative jurisdiction as do the second and third clauses. Indeed, this Court in *United States v. Rio Grande, supra,* has established a specific test for invoking regulatory control over activities covered only by the first clause of Section 10. That test incorporates a presumption that water diversions that, as here, represent allocation of water under state water rights law, do not represent an obstruction of navigable capacity. Rebuttal of that presumption requires a factual showing that the diversion "substantially interferes with the navigable

capacity within the limits where navigation is a recognized fact", (174 U.S. at 709-710, 19 S.Ct. at 777). There clearly is no suggestion in this case, as there was in *Rio Grande*, that the challenged diversion would "destroy" the navigable capacity of the Delta (Pet. Br. 39-40).

The *Rio Grande* test and presumption have been ratified by subsequent Congressional declarations of deference to the appropriation of water supplies under state water rights law (Pet. Br. 28-33). Furthermore, those declarations have been recognized and incorporated in recent decisions of this Court, *California v. United States*, 438 U.S. 645, 678, 98 S.Ct. 2985, 3002 (1978); *United States v. New Mexico*, 438 U.S. 696, 701-702, 98 S.Ct. 3012, 3015 (1978). Certainly, those declarations do not suggest any reversal of the *Rio Grande* presumption.

The Congressional declarations of a presumption in favor of state regulation of water diversions are much more pervasive than respondents suggest. The allegation that we rely primarily on Section 8 of the Reclamation Act of 1902 is just not true (Fed. Br. 36). Our reliance is also based on at least 20 subsequent statutes that are not part of the Reclamation Act (Ptn. App. 134-151). One of those statutes is the McCarren Amendment which this Court recently described as an "eloquent expression of the need to observe state water law" (Ptn. App. 140-141; *United States v. New Mexico, supra*, 438 U.S. at 678, 98 S.Ct. at 3002).

Furthermore, since this present case specifically raises water quality issues (Fed. Br. 6; Jt. App. 22a), the declaration in the 1977 Clean Water Act provides a specific and current restatement of Congressional policy of *not* imposing federal controls on water allocations established by state law, in the absence of a tangible, rather than marginal, inconsistency with a substantial federal interest (Ptn. App. 150, 151).

Conclusion.

For the reasons stated above, the petitioners urge this Court to reverse the judgment and opinion of the Circuit Court, including its recognition of automatic Section 10 permit controls over non-structural water supply diversions.

Respectfully submitted,

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APPENDIX.

PERTINENT PROVISIONS OF 1899 RIVERS AND HARBORS ACT REGULATION, 33 CFR §209.120(a) and (b).*

As of July 1, 1973:

§209.120 Permits for work in navigable waters.

(a) *Organization*—(1) *Civil functions of the Department of the Army*. In addition to its military duties, the Department of the Army, acting through the Corps of Engineers performs extensive civil functions which include the execution, operation, maintenance, and control of river and harbor and flood-control improvements authorized by law, and the administration of certain laws enacted by Congress for the protection and preservation of navigation and navigable waters of the United States.

(2) *The Corps of Engineers*—(i) *Central organization*. The civil functions of the Department of the Army are carried out by the Corps of Engineers. The Chief of Engineers commands the Corps of Engineers and is responsible to the Secretary of the Army. On his staff in the Office of the Chief of Engineers, Washington, D.C. 20315 the Director of Civil Works is directly responsible for the civil functions described herein.

(ii) *Field organization*. For administrative convenience and to permit decentralization of Civil Works operations, the United States and its possessions are divided into 11 ''Divisions'' which are subdivided into 37 ''Districts''. The Division Engineer in charge of a Division supervises the activities of the District Engineers in charge of the District offices in that Division.

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*The material contained in subsection (b) is now contained in 33 CFR §§ 320.2 and 322.33 (July 1, 1980).

All Division and District Engineers are commissioned Army officers. In the United States the boundaries of Districts and Divisions are governed by the limits of the watersheds of principal rivers.

(b) *Jurisdiction*—(1) *Principal laws*. (i) The principal laws for the protection and preservation of navigation and navigable waters of the United States, administered by the Corps of Engineers, are:

(*a*) *Dams and dikes across waterways*. Location and plans of dams and dikes across navigable waters must be approved by the Chief of Engineers and Secretary of the Army prior to construction. Section 9 of the River and Harbor Act of March 3, 1899 (30 Stat. 1151; 33 U.S.C. 401).

(*b*) *Piers, dredging etc., in waterways*. Plans for wharves, piers, dolphins, booms, weirs, breakwaters, bulkheads, jetties, or other structures, *and excavation or fill in navigable waters* must be recommended by the Chief of Engineers and approved by the Secretary of the Army. Section 10 of the River and Harbor Act of March 3, 1899 (30 Stat. 1151; 33 U.S.C. 403). The authority of the Secretary of the Army to prevent obstructions to navigation was extended to artificial islands and structures on the Outer Continental Shelf (Section 4(f)) of the Outer Continental Shelf Lands Act approved Aug. 7, 1953 (67 Stat. 463; 43 U.S.C. 1333(f)). (Emphasis added)

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As amended on Apr. 3, 1974 per 39 FR 12118:

§209.120 Permits for activities in Navigable Waters or Ocean Waters.

(a) *Purpose*. This regulation prescribes the policy, practice, and procedure to be followed by all Corps of Engineers installations and activities in connection with applications for permits authorizing structures and work in or affecting navigable waters of the United

States, the discharge of dredged or fill material into navigable waters, and the transportation of dredged material for the purpose of dumping it into ocean waters.

(b) *Laws requiring authorization of structures or work.* (1) Section 9 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1151; 33 U.S.C. 401) prohibits the construction of any dam or dike across any navigable water of the United States in the absence of Congressional consent and approval of the plans by the Chief of Engineers and the Secretary of the Army. Where the navigable portions of the waterbody lie wholly within the limits of a single State, the structure may be built under authority of the legislature of that State, if the location and plans or any modification thereof, are approved by the Chief of Engineers and by the Secretary of the Army. The instrument of authorization is designated a permit. Section 9 also pertains to bridges and causeways but the authority of the Secretary of the Army and Chief of Engineers with respect to bridges and causeways was transferred to the Secretary of Transportation under the Department of Transportation Act on October 16, 1966 (80 Stat. 941, 49 U.S.C. 1165g(6)(A)).

(2) Section 10 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1151; 33 U.S.C. 403) prohibits the unauthorized obstruction or alteration of any navigable water of the United States. The construction of any structure in or over any navigable water of the United States, the excavation from or depositing of material in such waters, or *the accomplishment of any other work affecting the course, location, condition, or capacity of such waters* are unlawful unless the work has been recommended by tbe Chief of Engineers and authorized by the Secretary of the Army. The instrument of authorization is designated a permit or letter

of permission. The authority of the Secretary of the Army to prevent obstructions to navigation in the navigable waters of the United States was extended to artificial islands and fixed structures located on the outer continental shelf by section 4(f) of the Outer Continental Shelf Lands Act of 1953 (67 Stat. 463; 43 U.S.C. 1333(f)). (Emphasis added)

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